Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ARTHUR GARCIA SANCHEZ,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

MARK STEVENS
Member,
Supreme Court Bar

310 S. St. Mary's Street
Tower Life Building,
Suite 1505
San Antonio, Texas 78205
Tel. (210) 226-1433
Fax (210) 223-8708

STEPHANIE L. STEVENS*
Member,
Supreme Court Bar

St. Mary's University
2507 N.W. 36th Street
San Antonio, Texas 78228
Tel. (210) 431-5710
Fax (210) 431-5750

Counsel for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Texas enacted and enforced a statute which makes sexual harassment a criminal offense and which proscribes:

> [U]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

Tex. Pen. Code Ann. § 39.03 (Vernon 1994). The Texas Court of Criminal Appeals declined to apply a limiting construction to the statute.

I.

Whether the Texas statute criminalizing sexual harassment is vague and promotes arbitrary and discriminatory enforcement in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II.

Whether the Texas statute criminalizing sexual harassment is overbroad, not tailored narrowly to serve legitimate state interests, and interferes unnecessarily with the right to freedom of speech and expression in violation of the First and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Garcia Sanchez prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in his case.[1]

CITATION TO THE OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 995 S.W.2d 677 (Tex. Crim. App. 1999), and is attached as Appendix A. The opinion of the Court of Appeals for the Fourth Court of Appeals District of Texas is reported at 974 S.W.2d 307 (Tex. App. – San Antonio 1998, pet. granted), and is attached as Appendix B. The trial court did not render a written opinion.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on June 30, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the application of the First and Fourteenth Amendments to the Constitution of the United States, which are included as Appendix C.

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[1] The caption contains all parties to the proceeding. *See* Sup. Ct. R. 14.1(b).

STATEMENT OF THE CASE

A. Facts Material To Consideration Of The Questions Presented

Petitioner Arthur Garcia Sanchez was charged with the crime of official oppression by sexual harassment pursuant to TEX. PENAL CODE ANN. § 39.03(a)(3) (Vernon 1994).[2] See Appendix D. The indictment alleged that, while acting as chairman of the local transit authority in San Antonio, Texas, Mr. Sanchez intentionally subjected the complainant to sexual harassment, "namely, unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature . . . " by saying and doing to the complainant the following:

1. "that if [she] did not have a sexual affair with him he would fire her;"

2. "that to get an office, a secretary and a raise [she] must have a sexual affair with him;"

3. "that he had a sexual affair with another VIA employee and he would have a sexual affair with [her] also;"

4. "that he would have a sexual affair with [her];

---

[2] The indictment alleges that the crimes were committed between August 1, 1994 and February 15, 1995. Until September 1, 1994, the statute in effect was Tex. Penal Code § 39.02. On September 1, 1994, this statute was renumbered § 39.03. Accordingly, both statutes are implicated. Other than their numbers, however, the statutes are identical. Throughout this petition the statute will be referred to as § 39.03 or "the statute".

5. "that [she] should have a sexual affair with him because people already thought they were having a sexual affair;"

6. "that [she] must put on lipstick;"

7. "that he would like [her] to wear low-cut dresses;"

8. "that he would like [her] to wear black panythose and silk blouses because she looked better in them;"

9. "that upon seeing a bruise on [her] leg, that he asked [her] if she was bruised from rough sex with her husband, and that he liked rough sex; and"

10. "by touching [her] with his hand on her face."

The indictment concluded by alleging: "submission to which was explicitly and implicitly made a term and condition of [the complainant's] exercise and enjoyment of her rights, privileges, powers and immunities. [R.5]

Although alleged conjunctively in the indictment, the ten statements or actions detailed above were submitted disjunctively to the jury, which was authorized to convict if it found any one of them to be true beyond a reasonable doubt. [R.4-5] All allegations were contested and refuted at trial save number 6, "that [she] must put on lipstick." Thus, the state was able to argue that the jury could convict Mr. Sanchez, not only if it believed that he had threatened to fire the complainant if she refused to have a sexual affair with him, but also if it believed that he had "insisted that she wear lipstick." [R.VII – 10] The jury found Mr. Sanchez guilty and assessed his punishment at one year probation and a fine of $3,000.00. [R.203]

B. How The Federal Questions Were Raised And Decided Below

Prior to the start of the trial, Mr. Sanchez filed a pretrial application for writ of habeas corpus as well as a motion to set aside the indictment, complaining in both that the official oppression statute was overbroad and vague in violation of the First and Fourteenth Amendments to the United States Constitution. [R.94-107; 112-115] Both the application and the motion were denied by the trial court. [R.107; 118]

Mr. Sanchez's first appeal was to the Fourth Court of Appeals District of Texas where he complained, among other things, that the statute authorizing his conviction was unconstitutional on its face and as applied, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Fourth Court of Appeals agreed with Mr. Sanchez's facial challenge and reversed the conviction. That court also found the statute unconstitutionally overbroad, in violation of the First Amendment. *Sanchez v. State*, 974 S.W.2d 307, 319-21 (Tex. App. – San Antonio 1998, pet. granted).

The State of Texas filed a petition for discretionary review in the Texas Court of Criminal Appeals, and that court reversed the holding of the intermediate court. According to the court of criminal appeals, the statute in question was neither overbroad, nor was it unconstitutionally vague. *Sanchez v. State*, 995 S.W.2d 677, 689-90 (Tex. Crim. App. 1999).

REASONS FOR GRANTING THIS PETITION

The criminal statute in question here prohibits a public servant from intentionally subjecting another to sexual harassment. According to the statute,

> "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

TEX. PENAL CODE ANN. § 39.03 (Vernon 1994). By defining "sexual harassment" in this way, Texas has enacted a statute that is constitutionally defective for two reasons.

First, the statute is unconstitutionally vague, in violation of the Due Process Clause, both because it fails to give fair notice of what is meant to be prohibited, and because it encourages arbitrary and discriminatory arrests. Because this is a criminal statute which is capable of reaching First Amendment freedoms, a heightened degree of specificity is required, and this statute is insufficiently specific to pass constitutional muster.

Second, the statute in this case is overbroad, in violation of the First Amendment. Although the government unquestionably has an interest in regulating sexual harassment, it may do so only with narrowly drawn and carefully tailored regulations which do not unnecessarily interfere with the freedom of speech and expression. Texas's criminal sexual harassment statute is neither narrowly drawn nor carefully tailored.

A. The Statute Is Void For Vagueness

A criminal statute must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the criminal law must establish specific guidelines for law enforcement so as to avoid the dangers of arbitrary and discriminatory application. Third, when First Amendment rights are implicated, the law must be "sufficiently definite not to abridge the right of free speech, but also to avoid chilling protected expression." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). The Texas statute fails on all three grounds.

1. Lack of notice

The actual conduct the statute purports to forbid – "unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature" – is so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Vagueness inheres in virtually every word of this statute. What are "advances" and "favors?" What makes them "sexual?" What enormous range of conduct is contemplated by the catch-all phrase "or other verbal or physical conduct *of a sexual nature*?" What constitutes *implicit* conduct? Implicit to whom? How is implicit conduct to be established? What sort of "submission" is contemplated by the statute? Is this to be subjectively or objectively determined? What exactly constitutes "submission?" What does "term or condition" signify? What does the statute contemplate by the broad terminology "exercise or enjoyment of *any* right, privilege, power,

or immunity?" *See City of Akron v. Akron Center for Reproductive Freedom*, 462 U.S. 416, 451 (1983) ("the word 'humane' was impermissibly vague as a definition of conduct subject to criminal prosecution").

Although vagueness permeates the entire definitional portion of the sexual harassment statute, perhaps the most glaring defect stems from the requirement that the sexual advances, requests for favors, and other verbal or physical conduct of a sexual nature, be "*unwelcome.*" What is the difference between *welcome* and *unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature? To whom must this conduct be unwelcome: the individual complainant, a "reasonable person," the prosecutor, the police, the judge, or the jury? The statute does not specify. The word "unwelcome" is inherently vague. In *Coates v. Cincinnati*, 402 U.S. 611 (1971), this Court struck down as vague an ordinance which prohibited persons from assembling on a sidewalk and conducting themselves "in a manner annoying to persons passing by. . . . " *Id.* at 611. The statute was vague, not merely in the sense that it required conformance to an imprecise standard, but "rather in the sense that no standard of conduct is specified at all." *Id.* at 614. As a result, persons of common intelligence were forced to guess at the meaning of the ordinance. "Conduct that annoys some people does not annoy others." *Id.* That is precisely the problem with Texas's sexual harassment statute. Conduct that is welcome to some might be unwelcome to others. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) (finding vague a statute which made it illegal to treat a flag contemptuously,

because "what is contemptuous to one man may be a work of art to another").

The questions about the statute posed in the preceding paragraphs cannot be predictably answered by persons of ordinary intelligence. The intermediate court below was concerned with these questions, and more, and agreed with Mr. Sanchez that the statute was infirm. *See Sanchez v. State*, 974 S.W.2d 307, 314 (Tex. App. – San Antonio 1998, pet. granted). Although the Texas Court of Criminal Appeals held that the statute was constitutional, an examination of its opinion merely confirms the statute's vagueness.

For example, the court of criminal appeals agreed that "the statute does not impose a reasonable person requirement." *Sanchez v. State*, 995 S.W.2d at 685. In contrast, this Court has recognized that a statute may be unconstitutionally vague when the standard of conduct it specifies is dependent on each complainant's sensitivity. *See Coates v. City of Cincinnati*, 402 U.S. at 614. One way to cure such a victim-subjective standard is to require a "reasonable person" test. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993) ("[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview"); *Nichols v. Frank*, 42 F.3d 503, 511-12 (9th Cir. 1994). In *Kramer v. Price*, 712 F. 2d 174, 178 (5th Cir. 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir. 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir. 1984), the federal court of appeals struck down the Texas harassment statute as vague because it made "no attempt at all to specify whose sensitivity must be offended. In

the absence of judicial clarification, enforcement officials, as well as the citizens of Texas, are unable to determine what conduct is prohibited by the statute." The same is true here. It is unclear from Texas's sexual harassment statute who must regard Mr. Sanchez's conduct as "unwelcome." Is it the individual complainant, a "reasonable person" complainant, a prosecutor, judge or jury? As the statute is written, no one can determine what conduct is prohibited.

With regard to application of "unwelcome," the court of criminal appeals conceded that the Texas statute is "ambiguous" as to whether this word modifies only "sexual advances," or also "requests for sexual favors," and "other verbal or physical conduct of a sexual nature." Although acknowledging that its "interpretation does create an awkward construction," the court went on to conclude after a lengthy analysis that it modifies "all forms of sexual harassment." *Sanchez*, 995 S.W.2d at 683-85.

Additionally, Mr. Sanchez complained in his brief below that the terms "rights, privileges, powers, and immunities" are also vague. The court of criminal appeals acknowledged that these terms are undefined, finally declaring that, "[f]or the purposes of this opinion we will assume, but do not decide, that the phrase 'rights, privileges, and powers, and immunities' is so broad that it covers anything of value to a person." *Sanchez*, 995 S.W.2d at 686.

And, the court's discussion of the requisite culpable mental state is revealing. The majority of the court discerned, after a lengthy discussion, that the defendant

need not intend that his conduct be unwelcome, provided that he intended sexual conduct that he knows is unwelcome. *Sanchez*, 995 S.W.2d at 677, 685 n.7. Indeed, the court ultimately attached considerable importance to this, finding that the definition of "sexual harassment" was "a reasonably specific phrase for Due Process purposes primarily because that phrase is modified by the culpable mental state of 'intentionally.' " *Id.* at 689. Interestingly, though, Judge Womack rejected the interpretation that knowledge of unwelcomeness is enough. "I see no room in that language for a culpable mental state other than intent." *Id.* at 692-93 (Womack, J., concurring). *See Sanchez v. State*, 974 S.W.2d 307, 318 (Tex. App. – San Antonio 1998, pet. granted) (intermediate court of appeals unanimously found that the statute "specifies a mental state of 'intentionally' as opposed to mere knowledge or recklessness"); *cf. Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir. 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir. 1984) (merely specifying intent as an element, however, will not save a criminal statute from vagueness).

In other words, notwithstanding its ultimate holding below, the language of its own opinion belies the conclusion that the statute is not constitutionally vague. If judges experienced and trained in the law have such a difficult time discovering the meaning of "sexual harassment," and indeed are sometimes unable to agree among themselves, how can a citizen-accused be expected to know what the law requires?

2. Arbitrary enforcement is encouraged

A statute is also void for vagueness when it "encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). If arbitrary and discriminatory enforcement is to be avoided, laws must provide explicit guidelines for those who apply them. *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972).

Federal courts have grappled with the difficulty of properly defining "sexual harassment" even in the context of civil suits.

> In some versions, it [sexual harassment] appears to cover the widest possible range of sins, from physical assault to reading a magazine in a public facility. Whether particular conduct is appropriate or whether it crosses the line is the subject of disagreement and controversy, always heated and often legitimate. Public opinion can change rapidly. It is quite possible for conduct that is acceptable today to become unacceptable tomorrow. One's views are influenced by one's age, sex, national origin, religion, philosophy, education, and experience. There is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct.

Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994).

In Mr. Sanchez's case, because the sexual harassment definition is so all encompassing, the police, the prosecutor, and ultimately, the jury, were allowed to decide the definition of these terms based on nothing more than their own aversions or preferences. The jury may well

have convicted Mr. Sanchez on the only uncontradicted allegation in the indictment – that he asked the complainant to put on lipstick. Because of the definition of "sexual harassment" provided by the statute, first the investigators, then the prosecutors, then the jurors, were left to their own views, influenced by their age, sex, education, and experience. The result is "arbitrary and erratic arrests and convictions" condemned by the constitution. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). *See also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (condemning "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections").

3. Greater protection due because First Amendment values are implicated

Because the statute at issue here is a criminal statute, it is subject to a greater degree of scrutiny by a reviewing court, particularly where complaints are made about vagueness and overbreadth. In *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), the Court was required to determine the constitutionality of the Communications Decency Act of 1996, known as the CDA:

> The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties

> including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.

Id. at 2344 (citations omitted).

Texas's sexual harassment law is a "content-based regulation of speech." One convicted of this offense can be jailed for up to a year. The "obvious chilling effect on free speech" exerted by the statute raises "special First Amendment concerns." And, the "severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images." *Id.*

4. Certiorari should be granted

Decisions from this Court cited in this petition support Mr. Sanchez's contention that the statute under which he was prosecuted is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because the decision of the Texas Court of Criminal Appeals conflicts with these decisions, certiorari should be granted. Sup. Ct. R. 10(c).

B. The Statute Is Overbroad

1. A statute which criminalizes a "wink" or a "smile" is overbroad

The First Amendment generally prevents the government from proscribing speech. *R.A.V. v. City of St. Paul,*

Minnesota, 505 U.S. 377, 382 (1992). Criminal statutes that make unlawful a substantial amount of constitutionally protected conduct or speech may be held facially invalid even if they have some legitimate application. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). In fact, this Court has held that such statutes may be challenged by anyone in order to protect those whose First Amendment rights are threatened but are not before the Court. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

The Texas sexual harassment statute criminalizes speech and expressive conduct. *Sanchez*, 974 S.W.2d at 321. The statute has not been narrowly tailored or interpreted to prohibit only unprotected speech like disorderly conduct, fighting words, obscene or opprobrious language. *Id.* In fact, the Texas Court of Criminal Appeals found that the statute could indeed include a "wink or smile" within its proscribed conduct. *Sanchez*, 995 S.W.2d at 685.

The court below held that the statute did not violate the First Amendment because this Court has indicated that Title VII does not infringe upon protected speech. *Sanchez*, 995 S.W.2d at 687. In fact, this Court has not directly addressed the relationship of the civil sexual harassment statute with regards to the First Amendment. Indeed, the Fifth Circuit, which governs Texas, has interpreted this Court's comments regarding Title VII to indicate that a First Amendment challenge may have merit.

> The Court's pronouncement in R.A.V., that "sexually derogatory 'fighting words', among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" does not mean

> that Title VII trumps the First Amendment speech rights. Rather, as the next sentence in R.A.V. explains, conduct not targeted on the basis of its expressive content may be regulated. Citing R.A.V., the Court in Wisconsin v. Mitchell, reiterated that conduct not targeted on the basis of its expressive content may be regulated by Title VII. However, application of Title VII to the "conduct" in the case sub judice would do precisely that – regulate speech on the basis of its expressive content.

DeAngelis v. El Paso Municipal Police Officers Association, 51 F.3d 591, 597 n.7 (5th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995) (citations omitted).

The Fifth Circuit went on to note that when pure expression is involved, Title VII is venturing into First Amendment problems. "It is no use to deny or to minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based viewpoint discriminatory restrictions on speech." *Id.* at 596. The court of criminal appeals erred when it said that this Court "has indicated that Title VII does not infringe upon protected expression;" moreover, a statute that imposes criminal penalty is subject to a greater degree of scrutiny, particularly when it addresses vagueness and overbreadth concerns. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

Further, the Texas statute here is even more overbroad than the federal civil statute upon which it is partially modelled. Instead of the phrase "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment" that is used

in Title VII, the Texas statute criminalizes "submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity." *See Sanchez*, 974 S.W.2d at 307. And, Title VII is limited to the workplace. The Texas statute is specifically *not* limited to "the workplace, the employer-employee relationship, or equal opportunity for employment." *Sanchez*, 974 S.W.2d at 307. Indeed, legislative history indicates an intent for the statute to apply *only* outside the employment context. *Sanchez*, 995 S.W.2d at 686 n.8. Perhaps one reason for allowing the regulation of offensive and discriminatory speech in the workplace is the employee's economic dependence on her job and because she is a "captive audience." *See* Cynthia Estlund, *Freedom of Expression in the Workplace and The Problem of Discriminatory Harassment*, 75 Tex.L.Rev. 687, 715-718 (1997). On the other hand, a statute criminalizing speech outside the workplace should be viewed with the utmost scrutiny.

The court below likened the statute to bribery, which is unprotected speech, because the statute required the actor "to intend submission to which to be a term or condition of the recipient's or another person's enjoyment of something of value to that person." *Sanchez*, 995 S.W.2d at 687. Unlike bribery, though, in which the actor's speech must be intended to obtain a benefit, the sexual harassment statute does not require either that the actor benefit or that the recipient demonstrate any tangible loss. Because of the overbroad language, "submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity either explicitly, or *implicitly*," and in light of the lack of a

reasonable person standard, the statute is in no way limited to unprotected speech.

As the intermediate court of appeals below noted, an invitation to lunch could be an unwelcome sexual advance. Likewise, an individual could believe that such an unwelcome request implicitly required submission, and further believe their exercise or enjoyment of a right, privilege or power or immunity was implicitly affected. Such a belief on behalf of the invitee, no matter how unreasonable, could lead to a criminal punishment. A statute that criminalizes such protected speech is overbroad and therefore unconstitutional on its face.

2. The overbreadth of the statute chills the speech of citizens

Because the Texas statute employs language that is both vague and expansive, public servants will tend to say nothing which might be construed to be "of a sexual nature," for fear that someone else might consider "submission" to same to be a "term or condition" for the "exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly," thereby subjecting the public servant to prosecution and incarceration. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). This result is particularly dangerous in the public sphere.

"Speech is often provocative and challenging . . . [But it] is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present

danger of a serious substantial evil that arises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Statutes such as the one in Texas fail to provide the boundaries of forbidden areas. Consequently, the language regarding legitimate romance is chilled.

> People who work closely together and share common interests often find that sexual attraction ensues. It is not surprising that those feelings arise even when one of the persons is a superior and the other a subordinate. As the workplace grows, and more and more of us find it necessary, or desirable, to earn our own living, we spend an increasing amount of our time at work. Sexual barriers to employment have lessened. We tend these days, far more than in earlier times, to find our friends, lovers, and even mates in the workplace. We spend longer hours at the office or travelling for job-related purposes, and often discover that our interests and values are closer to those of our colleagues or fellow employees than to those of people we meet in connection with other activities. In short, increased proximity breeds increased volitional sexual activity.

Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994).

Because the Texas criminal statute is impermissibly overbroad, it sweeps within its coverage a substantial amount of expressive activity which is protected by the First Amendment. Certainly sexual harassment is inappropriate, and, if the elements are both narrowly defined and proven, it should be actionable in *civil* courts. In Texas, of course it is. *E.g., Ewald v. Wornick Family Foods*, 878 S.W.2d 653, 658-59 (Tex. App. – Corpus Christi 1994,

writ denied). Even assuming there is a compelling need for the government to regulate sexual harassment with the *criminal* law, though, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Sable Communications of California v. F.C.C.*, 492 U.S. 115, 126 (1989). The Texas sexual harassment statute fails this test.

3. Certiorari should be granted

Neither this Court nor any federal circuit courts have addressed the constitutionality of this, or any other, *criminal* sexual harassment statute. Nor has this Court yet directly addressed the First Amendment concerns raised by the *civil* federal employment discrimination statute in Title VII of the Civil Rights Act of 1964, upon which this criminal statute is based. *See* 42 U.S.C. § 2000e-2(a)(1). Several federal circuit courts have, however, spoken to this matter, and have reached differing opinions. *See Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-72 (9th Cir. 1996) (public college's sexual harassment policy was unconstitutionally vague as applied to professor), *cert. denied sub. nom., Beeman v. Cohen*, 520 U.S. 1140 (1997); *see also DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591, 597 n. 7 (5th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995) (questioning the relationship of Title VII and the First Amendment); *but see Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1245-46 (10th Cir. 1999) (upholding Title VII against First Amendment attack). Certiorari should be granted in Mr. Sanchez's

case to settle this important question of federal constitutional law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

CONCLUSION

Arthur Garcia Sanchez was convicted pursuant to a statute that violates the First and Fourteenth Amendments to the United States Constitution. This petition for writ of certiorari should be granted.

Respectfully submitted,

MARK STEVENS
Member,
Supreme Court Bar

310 S. St. Mary's Street
Tower Life Building,
Suite 1505
San Antonio, Texas 78205
Tel. (210) 226-1433
Fax (210) 223-8708

STEPHANIE L. STEVENS*
Member,
Supreme Court Bar

St. Mary's University
2507 N.W. 36th Street
San Antonio, Texas 78228
Tel. (210) 431-5710
Fax (210) 431-5750

Attorneys for Petitioner
**Counsel of Record*

APPENDIX A

App. 1

Arthur Garcia SANCHEZ, Appellant,

v.

The STATE of Texas,
No. 1259-98.

Court of Criminal Appeals of Texas.

June 30, 1999

Stephanie L. Stevens, Mark Stevens, San Antonio, for appellant.

Daniel Thornberry, Asst. Dist. Atty., San Antonio, Matthew Paul, State's Atty., Austin, for State.

OPINION

KELLER, J. delivered the opinion of the Court in which McCORMICK, P.J., and MEYERS, MANSFIELD, PRICE, HOLLAND, JOHNSON and KEASLER, JJ., joined.

Appellant was convicted under the "sexual harassment" provision of the official oppression statute. *See* TEX. PEN. CODE § 39.03(a)(3).[1] Relying in large part upon *Long v. State*, 931 S.W.2d 285 (Tex.Crim.App.1996), he argued to the Court of Appeals that this provision is unconstitutionally vague on its face and as applied to his conduct. The Court of Appeals sustained these contentions, finding that the sexual harassment provision is (1) unconstitutionally vague on its face and as applied in violation of the Due Process Clause of the Fourteenth

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[1] All references to sections or subsections are to the Texas Penal Code in effect at the time of the offense unless otherwise specified.

Amendment and (2) unconstitutionally overbroad in violation of the First Amendment. *Sanchez v. State*, 974 S.W.2d 307 (Tex.App. – San Antonio 1998). As a result, the Court of Appeals ordered the dismissal of the prosecution.[2] We will reverse the Court of Appeals.

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[2] The Court of Appeals summarized the evidence in this case as follows:

> The complainant Gonzalez was hired by the Board of Trustees of the Via Metropolitan Transit in San Antonio as an assistant to the Board in securing federal grant money. She was placed in the Public Affairs Division of Via, with instructions to report to appellant, the Board Chairman. The allegations of the indictment were chiefly supported by Gonzalez's testimony since the matters arose in private conversations. Gonzalez commenced taping her conversations with appellant in December 1994 or January 1995. The tapes do not support the indictment's allegations. Several witnesses heard appellant tell Gonzalez to put on lipstick or makeup. The grand jury testimony by appellant was introduced. He acknowledged that on an occasion he told Gonzalez to put on lipstick because she looked pale.
>
> Gonzalez acknowledged that she had been hired by the Board and could only be fired by the Board, but knew appellant as Chairman, had great influence and that appellant had so informed her. There was testimony that Gonzalez traveled by plane with appellant to a transportation conference in Washington, D.C., in September 1994, going earlier and coming back later than other representatives of Via at the conference. Gonzalez was instructed to attend after-work meetings at the bar at the Mi Tierra Restaurant several nights a week. Other evidence showed that appellant frequently called Gonzalez at her home at night and that there was concern on the

I. THE STATUTE

A. The statutory language

The "sexual harassment" portion of the official oppression statute provides: "A public servant acting

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part of one Board member about the relationship. Other testimony indicated that appellant prevented Gonzalez from attending some Board meetings and dictated to her which employee or employees with whom she could not have lunch.

There was no question that Gonzalez had demanded, requested, or expressed a desire repeatedly for a raise, an enclosed office, and a private secretary. One Board member testified that before Gonzalez started her $52,000 job, she requested a raise in order to influence the individuals with whom she would come into contact in the course of her employment. The request was denied. When Gonzalez commenced her employment, there was only one enclosed office in the Public Affairs Division which at the time was occupied by appellant. A smaller enclosed office was built for appellant and the larger one was assigned to Tom Campos, a staff member, by the general manager of Via and appellant. The secretary whom Gonzalez shared with others testified that she typed only three letters for Gonzalez in the eight months or so that Gonzalez was employed by Via.

Other evidence indicated that Gonzalez was constantly inquiring about appellant's whereabouts, spent a great deal of time in appellant's office with the door closed, seemed happy and "jolly" around appellant, and fawned over him. She was always offering to take appellant to lunch or to drive him places. Appellant had a disability as a result of having polio when he was a child. Some witnesses testified

under color of his office or employment commits an offense if he . . . intentionally subjects another to sexual harassment." § 39.03(a)(3). A detailed listing of categories falling within the classification of "public servant" is found in the definition section of the penal code.

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that Gonzalez followed appellant around the office, even waiting for him outside the men's restroom. On one occasion, appellant was heard to tell Gonzalez that "he didn't need a shadow, that he had two at home, his mother and his dog." Gonzalez was also seen playing "patty-cake" with appellant at the bar at Mi Tierra.

There was evidence of dissension in the office between Gonzalez and other women employees, some of it arising from Gonzalez's insistence that she was another employee's supervisor. Gonzalez was to complete a legislative agenda project for the Board regarding federal grant money. The report was delayed month by month and, when it was tendered to the Board in January 1995, it was found unacceptable. There was evidence that the Board was generally becoming dissatisfied with Gonzalez's work.

Gonzalez terminated her employment on February 15, 1995, and filed a EEOC complaint. Her husband and brother, both lawyers, presented a 1.2 million dollar claim to Via which was refused. A civil suit was filed and the instant criminal indictment came later.

The trial court's jury charge tracked the indictment but submitted each allegation disjunctively, authorizing conviction on any one of the allegations.

Sanchez, 974 S.W.2d at 311 n. 6.

§ 1.07(41).[3] A public servant acts under color of his office or employment "if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity." § 39.03(b). "Sexual harassment" is specifically defined as meaning:

> unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

§ 39.03(c).

B. The legislative history

In proposing the sexual harassment provision, the sponsor and supporters related an incident in which a municipal judge purportedly offered to dismiss a woman's traffic tickets in return for sexual favors. *See* H.B.370, Public Hearings, House Criminal Jurisprudence Committee and Subcommittee on Procedural Matters, April 3 (tape 2, side B & tape 3, side A), April 11 (tape 1, side 2), and April 17 (tape 1, side 2), 1989. The woman went to the judge's office to arrange a payment schedule because she did not have enough money to pay the full amount all at once. Charlotte Keel, H.B. 370, Public Hearings, House Criminal Jurisprudence Committee, April 3, 1989, tape 2, side B. The judge offered to take the woman in his truck for a ride and "see what they could work out." *Id.* After consulting law enforcement authorities, the

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[3] Appellant does not dispute his status as a public servant.

woman went to the judge's office again, this time wearing a hidden microphone. *Id.* The judge told the woman he would take care of her ticket in exchange for oral sex. *Id.* The woman asked if there was anything else she could do, such as maintenance work around the courthouse, but the judge said, "No, I have something else in mind for you." *Id.* The hearings indicated that the municipal judge was originally prosecuted for official oppression, but that indictment was quashed, and the judge pled guilty to a lesser offense. *See* hearings cited above. One of the supporters of the bill contended that a public official should be held to a higher standard of care and subject to higher sanctions than someone "on the street." Daniel Rice, H.B. 370, Public Hearings, House Criminal Jurisprudence Committee, April 3, 1989, tape 2, side B.

Another supporter indicated, in the form of a question, that the proposed law addresses abuse by officials "not under an employment situation, isn't that right?" Richard Avena, House Criminal Jurisprudence Committee, April 3, 1989, tape 3, side A. But subcommittee hearing discussions indicated that the bill would apply to public employment situations. H.B. 370, House Criminal Jurisprudence Committee, Subcommittee on Procedural Matters, April 11, 1989, tape 1, side 2 (references to improper conduct by one's "boss" and to the concern that employees might use the statute to harass their employers).

The subcommittee deleted the phrase "unwelcome sexual advances" from the definition of "sexual harassment" and added "by word or deed," but these changes

were later reversed and the original language – determined by the sponsor and the committee to be "far superior" to the subcommittee amendments – was restored. Representative Valigura, House Floor, May 20, 1989. The original language, and that which now appears in the "sexual harassment" definition, follows the language of the following Equal Employment Opportunity Commission (EEOC) regulation:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.

29 C.F.R. 1604.11(a)(1) (divisions (2) and (3) omitted). Division (1) of 16.04(a) is commonly known as the "quid pro quo" theory of sexual harassment. This regulation is itself an interpretation of the federal employment discrimination statute in Title VII.[4] The only significant difference between the sexual harassment definition in the official oppression statute and the EEOC regulation is the

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[4] The federal employment discrimination statute provides in relevant part:

> It shall be unlawful employment practice for an employer –
>
> 1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

substitution of "exercise or enjoyment of any right, privilege, power or immunity" for "employment." The substituted phrase was apparently borrowed from another provision of the official oppression statute:

> A public servant acting under color of his office or employment commits an offense if he:
>
> . . .
>
> (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

§ 39.03(a)(2).

II. COURT OF APPEALS' OPINION

The Court of Appeals found that many of the words used in § 39.03(c) "are susceptible to uncertainties of meaning and are inherently vague." *Sanchez*, 974 S.W.2d at 318. The Court of appeals raised questions regarding the following:

> (1) the meaning of "advances," "favors," and "other verbal or physical conduct of a sexual nature (for example, is a wink or a smile enough?),
>
> (2) what makes conduct "sexual,"
>
> (3) whether "unwelcome" applies to all conduct proscribed by the statute or only to "advances,"
>
> (4) whose sensitivities are involved and whether the statute imposes a reasonable person standard,

(5) the meaning of "submission,"

(6) what constitutes an implicit term or condition,

(7) whether the rights, privileges, powers, and immunities must exist at the time of the alleged conduct,

(8) whether the statute can be violated by the conditioning of the rights, privileges, powers, or immunities of a person other than the recipient of the alleged conduct,

(9) the scope of a "right" under the statute – whether it may be perfect or imperfect, in personam or in rem, primary or secondary, absolute or qualified, legal or equitable and whether such rights include constitutional rights, natural rights, civil rights, political rights, or personal rights.

Id. at 314 (enumeration ours; discussion paraphrased). The Court of Appeals concluded that the statute fails to specify whose sensitivities are affected and fails to impose a reasonable person standard. *Id.* at 318. Although acknowledging that the statute contains the culpable mental state of "intentionally," the Court of Appeals held that the culpable mental state did not alleviate the vagueness of the underlying conduct. *Id.* Finally, the Court of Appeals held that it could not employ a narrowing construction because doing so would significantly alter the meaning of the statute. *Id.* at 319.

As an alternative basis for its holding, the Court of Appeals contended that the provision is unconstitutionally overbroad under the First Amendment. *Id.* at 320-321. In arriving at this alternative holding, the Court

of Appeals said that the statute "deals with speech and expressive conduct" and that the "statute is not narrowly tailored to prohibit only . . . unprotected speech." *Id.* at 321 (ellipsis inserted).

III. ANALYSIS

A. General principles

In construing whether a law is vague and/or overbroad, we keep in mind the elementary principle of statutory construction: we interpret a statute in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results. *Boykin v. State*, 818 S.W.2d 782, 785-786 & 786 n. 4 (Tex.Crim.App.1991). In determining plain meaning, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and usage." TEX. GOV'T CODE § 311.011(a); *Dowthitt v. State*, 931 S.W.2d 244, 258 (Tex.Crim.App.1996). In the event that we find resorting to extratextual sources to be necessary under Boykin, these sources include but are not necessarily limited to: (1) circumstances under which the statute was enacted, (2) legislative history, (3) common law or former statutory provisions, (4) consequences of a particular construction, and (5) title (caption), preamble and emergency provision. TEX. GOV'T CODE § 311.023, made applicable to Penal Code by TEX. PEN. CODE § 1.05(b). We may also look to other offense provisions contained in the same statutory section. *Long*, 931 S.W.2d at 291 (comparing stalking provision to other provisions contained in § 42.07).

In addressing the Court of Appeals' holdings, we address the First Amendment's applicability before addressing the Court of Appeals' vagueness holding – not only because of the Court of Appeals' alternative holding regarding overbreadth, but also because the First Amendment's applicability "change[s] the character of the vagueness question." *Long*, 931 S.W.2d at 295. Due Process vagueness standards are less exacting than those dictated by the First Amendment. *Id.* at 287-288 (Citing *Kramer v. Price*, 712 F.2d 174 (5th Cir.), *rehearing en banc granted*, 716 F.2d 284 (5th Cir.), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir.1984)). And, under the First Amendment, a statute may be subject to a facial challenge even though it may have some legitimate application, but absent the First Amendment, "a facial challenge could be mounted successfully only if the statute were vague in all of its applications." *Long*, 931 S.W.2d at 295 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). To be vague in all of its applications, a statute must necessarily be vague as to the litigant; hence, if the statute is not vague as to the litigant, a Due Process challenge must necessarily fail: a person "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates*, 455 U.S. at 495, 102 S.Ct. 1186.

B. Statutory construction

1. *"Unwelcome"*

Some of the Court of Appeals' questions can be answered by simple statutory construction, without

resort to constitutional analysis. We begin with the application of the word "unwelcome." The text "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature," contained in the sexual harassment definition of the Texas statute, is ambiguous concerning what part of that list is modified by "unwelcome." As the Court of Appeals observed, the language produces two possible interpretations: (1) "unwelcome" modifies only "sexual advances," or (2) "unwelcome" modifies the entire list (i.e. "unwelcome" also modifies "requests for sexual favors" and "other verbal or physical conduct of a sexual nature"). Under the former interpretation, the statute would cover situations in which sexual conduct was welcomed by the recipient as part of a corrupt sex-for-benefits trade. The recipient, rather than being a victim of unwanted conduct, would be an accomplice to a form of bribery or prostitution. Under the latter interpretation, however, the statute would cover only situations in which the recipient was a victim of undesired conduct.

The latter interpretation does create an awkward construction. In essence, that interpretation would read the statute as proscribing "unwelcome sexual advances, unwelcome requests for sexual favors, and unwelcome other verbal or physical conduct of a sexual nature." In *State v. Edmond*, 933 S.W.2d 120 (Tex.Crim.App.1996), we discussed the parties arguments regarding whether an indictment for official oppression must define "unwelcome sexual advances" and "requests for sexual favors." *Id.* at 122, 127, & 128. The grouping of the terms in that discussion would imply that "unwelcome" relates only to "sexual advances." However, although we

employed the parties' terminology in discussing the point of error involved, we did not endorse that grouping of terms. *See id., passim.* And while the grammatical construction for the latter interpretation is awkward, that construction is not definitively incorrect. As the sexual harassment definition's language is ambiguous, we resort to sources outside the language of that definition.

The committee meetings are rather unhelpful. The subcommittee members deletion of "unwelcome sexual advances" in their proposed amendment may have been an indication that they believed that "unwelcome" modified only "sexual advances" rather than the entire list. But the subcommittee's amendment was rejected in favor of the original language. We find, however, that other sources present persuasive reasons for finding that "unwelcome" does indeed modify the entire list.

Because the portion of the Texas sexual harassment definition at issue is taken verbatim from an EEOC regulation, federal interpretation of that regulation is relevant to interpreting the Texas provision. At the time the Texas statute was passed, the Supreme Court had already interpreted "unwelcome" as applying to the entire list of sexually harassing conduct found in the EEOC regulation: "The gravamen of any sexual harassment claim is that the alleged sexual advances are 'unwelcome.' 29 C.F.R. § 1604.11(a) (1985)." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 68, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (discussing harassment claims in general and holding that "voluntariness" of participation in sexual conduct was irrelevant so long as the conduct was "unwelcome").

Moreover, the title of the Texas statute, "Official *Oppression*," indicates that the recipient is the victim of unwelcome conduct, not a coconspirator forming a corrupt bargain. Had the statute been intended to cover an entirely consensual, but corrupt, sex-for-benefits bargain, the title would more appropriately label the statute as "Official Corruption" or "Official Misconduct." In addition, the term "sexual *harassment*" connotes conduct undesired by the recipient. The term "sexual misconduct" would be a more appropriate description of conduct welcomed by the recipient in a corrupt bargain.[5] Finally, the other offenses contained in § 39.03 – subsections (a)(1) and (a)(2) – involve conduct that is necessarily not welcomed by the recipient.[6] Accordingly, we hold that all

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[5] And though willing sexual conduct would, therefore, not violate § 39.03, such conduct might be proscribed by statutes relating to prostitution or bribery. The prostitution statute provides:

> A person commits an offense if he knowingly:
>
> (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or
>
> (2) solicits another in a public place to engage with him in sexual conduct for hire.

§ 43.02(a). The bribery statute provides in relevant part:

> A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another . . . any benefit [e.g. sex] as consideration for the recipient's . . . exercise of discretion as a public servant.

§ 36.02(a)(1) (ellipsis and bracketed material added).

[6] § 39.03(a)(1) provides: "A public servant acting under color of his office or employment commits an offense if he . . . intentionally subjects another to mistreatment or to arrest,

forms of sexual harassment under the Texas provision must involve "unwelcome" conduct.

2. *"Intentionally"*

We agree with the Court of Appeals that the statute does not impose a reasonable person requirement. Had the Legislature intended that a reasonable person requirement apply, it could easily have specified one, and it did not. *See Long*, 931 S.W.2d at 290. However, we disagree with the Court of Appeals' conclusion that the statute fails to specify whose sensitivities are affected. The statute specifies *both* the perpetrator's and the victim's sensitivities. The phrase "intentionally subjects another to sexual harassment" indicates that (1) someone is subjected to sexual harassment, i.e. the victim's sensitivities are affected, and (2) the perpetrator intends that someone be subjected to sexual harassment, i.e. the perpetrator's own sensitivities are involved.

Moreover, the statute requires intent on the part of the perpetrator that the conduct be of a sexual nature, not merely that the recipient perceive the conduct as sexual. To intentionally subject someone to a sexual advance, for example, the actor must be *intending a sexual* advance. To use the Court of Appeals' examples, a wink or a smile would not fall within the statute unless the perpetrator *intended* the wink or smile to be a sexual advance (or a request for sexual favors, or other verbal or physical

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detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful." For text of subsection (a)(2), see this opinion, *ante*.

conduct of a sexual nature). Moreover, because the statute requires that the perpetrator intentionally subjects the victim to "unwelcome" sexual conduct, the perpetrator must necessarily be aware that the sexual conduct is in fact unwelcome to be liable under the statute.[7]

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[7] Given the structure of the statute and its apparent purposes, we find that the statute does not require the perpetrator to intend that the conduct be unwelcome. He may in fact wish that the conduct were welcomed by the recipient, but he intentionally subjects the recipient to unwelcome sexual conduct when he intends sexual conduct that he knows is unwelcome. This is so because the sexual nature of the conduct flows from the actor, but the unwelcome nature of the conduct flows from the recipient. Despite the fact that unwelcome describes a recipient's state of mind, the statute uses "unwelcome" as an adjective to describe the nature of the conduct. Hence, the perpetrator intends conduct which is unwelcome, but he does not necessarily intend the conduct to be unwelcome.

In his concurring opinion, Judge Womack contends that the structure of the statute supports the conclusion that the actor must intend the unwelcomeness of the conduct because other provisions in the official oppression statute specify both intentional and knowing mental states. While these other provisions offer some support for Judge Womack's contention, the placement of "unwelcome" in the particular grammatical construction in which it is found in the sexual harassment provision lends support for our interpretation of the statute, as explained above.

Moreover, because the portion of the statute containing the word "unwelcome" was borrowed verbatim from the EEOC regulation concerning sexual harassment, the variance in language from the other provisions of the official oppression statute is not so significant.

However, even if the plain language did call for the conclusion that Judge Womack advocates, that conclusion would lead to absurd results. A statute that covered only

Further, by making "sexual harassment" the object of "intentionally subjects" and then defining sexual harassment separately, the statute makes clear that the perpetrator's intent relates to the entire definition of sexual harassment. The statute requires that the perpetrator not only intentionally subject a victim to the specified unwelcome sexual conduct (sexual advances, request for sexual favors, etc.), the perpetrator must also intend that submission to the conduct is made a term or condition of a person's exercise of any right, privilege, power, or immunity. In other words, the culpable mental state applies to both (1) the sexual conduct, and (2) the *quid pro quo*.

3. *"rights, privileges, powers, and immunities"*

For the purpose of this opinion, we will assume, but do not decide, that the phrase "rights, privileges, powers, and immunities" is so broad that it covers anything of value to a person. Nevertheless, we find that employment

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conduct that an actor intended to be unwelcome – i.e., where the actor harbored the conscious objective or desire for the conduct to be unwelcome – would cover few instances of sexual coercion by a public servant in the *quid pro quo* context. That interpretation would seem to require something in the nature of sadistic intent. Given that the Legislature borrowed the language of the statute from the EEOC regulation involving sexual harassment, such a limited view of the sexual harassment provision is manifestly unreasonable. Moreover, the incident which incited this leglislation – the request for sexual favors by a municipal judge in exchange for dismissing a traffic ticket – appears unlikely to fall within a definition of sexual harassment that requires the actor to intend the unwelcomeness of the conduct.

in the public sector clearly falls within the meaning of "privilege." The word privilege has been used to mean numerous things, including *evidentiary privileges* (e.g. the attorney-client privilege) and constitutional rights (e.g. the privilege against self-incrimination). However, the above examples are clearly not what the Legislature means because "rights" are already enumerated in the statute along with privileges. Black's Law Dictionary lists numerous definitions of "privilege" but the one that seems most appropriate is the first one: "A particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens." BLACK'S LAW DICTIONARY, 6th ed., 1197 (1990). In discussing "privileges of employment" under the Title VII, the Supreme Court indicated that a "privilege" is a benefit that an entity is under no obligation to furnish. *Hishon v. King & Spalding*, 467 U.S. 69, 75, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Public employment is, of course, a benefit that the government is not obligated to furnish, and it is a benefit enjoyed by some persons but not by others. Public employment has been characterized by courts as a privilege, and the Supreme Court, while denouncing the idea that constitutional protections turn upon whether a governmental benefit is characterized as a "right" or "privilege," has indicated that public employment is at least a privilege. *See Elrod v. Burns*, 427 U.S. 347, 361 & 361 n. 15, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

And while the event that apparently led to the sexual harassment legislation was an incident between a public official and a private citizen, the language of the statute

does not exclude public employment from its scope.[8] In fact, we have previously held that another provision of the official oppression statute applies to an official's interactions with employees in the course of employment. *Bryson v. State*, 807 S.W.2d 742, 745-746 (Tex.Crim.App. 1991) (construing the phrase "intentionally subjects another to mistreatment" in § 89.03(a)(1)).

4. ***"a person's exercise or enjoyment"***

As the Court of Appeals suggested, the language of the statute does not limit the *quid pro quo* to the *recipient's* exercise or enjoyment of rights, privileges, powers, and immunities. Under the language, an official could make sexual advances upon the recipient submission to which would be a term or condition of a *third party's* exercise or enjoyment of a right, privilege, power or immunity. For example, an official could request sexual favors from an individual in exchange for arranging a relative's parole from prison. Such a scenario appears to be contemplated by the statute.

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[8] Richard Avena's remark during the committee hearings could be interpreted as evidencing an intent for the statute to apply only outside the employment context. However, this remark is weak evidence as it was an isolated comment and took the form of a question. Moreover, the speaker could merely have been referring to the fact that the statute's reach extended to conduct outside of the employment context. And subcommittee discussions referred to the employment context.

B. First Amendment

Where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. *Long*, 931 S.W.2d at 287 (citing *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). The question in the present case is whether the sexual harassment provision reaches protected expression. We have never had occasion to rule upon the constitutionality of the sexual harassment provision, and our research has uncovered few appellate cases from other jurisdictions addressing whether sexual harassment laws violate the First Amendment. Most appellate cases have found no First Amendment violation. *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1246-47 (10th Cir.1999) (upholding Title VII); *United States v. Swan*, 48 M.J. 551, 556 (N.M.Ct.Crim.App.1998) (upholding military regulation);[9] *Trayling v. Board of Fire and Police Com'rs*, 273 Ill.App.3d 1, 209 Ill.Dec. 846, 652 N.E.2d 386, 395 (2 Dist.1995) (Illinois statute modeled after Title VII). We have found one appellate case in which a sexual harassment provision was found to be unconstitutional, based upon First Amendment considerations, as applied to a particular defendant. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-972 (9th Cir.1996) (public community college's sexual harassment policy), *cert. denied sub. nom., Beeman v. Cohen*, 520 U.S. 1140, 117 S.Ct. 1290, 137 L.Ed.2d 364 (1997).

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[9] We recognize that the military court's opinion's persuasive value is limited due to the unique circumstances surrounding military service. *Swan*, 48 M.J. at 555.

The Supreme Court has indicated that Title VII does not infringe upon protected expression. *Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S.Ct. 2194, 124 L.Ed.2d 436 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) and *R.A.V. v. St. Paul*, 505 U.S. 377, 389-390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)); *see also Baty*, at 1246-47. The Court characterized Title VII as a valid "content-neutral regulation of conduct." *Mitchell*, 508 U.S. at 487, 113 S.Ct. 2194. However, the Court of Appeals correctly observed that the sexual harassment provision of the official oppression statute is only partially modeled upon the EEOC regulation for sexual harassment under the federal antidiscrimination law. The question remains whether the differences between the federal regulation and the Texas provision requires a different outcome under the First Amendment.

Whatever the scope of "rights, privileges, powers, and immunities," the sexual harassment provision of the official oppression statute proscribes conduct that, at least, contains the following elements:

> (1) an official's use of his official position,
>
> (2) to intentionally engage in conduct of a sexual nature or attempt to procure sexual favors,
>
> (3) which he knows is not welcomed by the recipient,
>
> (4) intending submission to which to be a term or condition of the recipient's or another person's enjoyment of something of value to that person.

The offense proscribed is in many ways similar to bribery or extortion. Under the common law, extortion by public

officials was essentially a form of bribery: the official took money that was not due him for the performance of official duties. *Evans v. United States*, 504 U.S. 255, 260, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992). Congress incorporated this common law definition into its Hobbs Act statute. *Id.* at 263-264, 112 S.Ct. 1881. Congress also provided for an offense of extortion involving private individuals in which property is taken by means of force, fear, or threats. *Id.* at 261.

Bribery and extortion, while involving "speech," are not protected by the First Amendment. "Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal." *United States v. Marchetti*, 466 F.2d 1309, 1314 (4th Cir.), *cert. denied*, 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972). "It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all." *United States v. Quinn*, 514 F.2d 1250, 1268 (5th Cir.1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976). *See also United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir.1988).

As with official extortion – what we would now call bribery – the sexual harassment provision is concerned with the use of official power to obtain a benefit to which the official was not otherwise entitled. In a bribery/official extortion case, that benefit was traditionally money or tangible property, but the receipt of someone's submission to sexual conduct seems to be as legitimate an object of government regulation. The First Amendment does not give an official the right to trade official services

for sexual favors or for submission to conduct of a sexual nature.

Further, as discussed above, the sexual harassment statute goes beyond mere bribery due to the requirement that the conduct be "unwelcome." With that requirement, the sexual harassment provision encompasses coercive conduct – analogous to private extortion. Sexual harassment under the statute is essentially sexual extortion: an official uses his official position to coerce submission to conduct of a sexual nature. And the statute criminalizes sexual harassment that is *intentional*. To be liable, the official must intend the sexual nature of his conduct, he must be aware that the conduct is unwelcome, and he must intend submission to the conduct to be made a term or condition of enjoying something of value to the recipient or another person – something of value that the official is in a position to withhold or provide. In other words, the official must intend to carry out sexual extortion. The First Amendment is not implicated by such activity.

Although the Court of Appeals relies heavily upon our previous opinion in *Long*, that case is distinguishable. The relevant provision of the stalking law, which we labeled "the conduct requirement," proscribed conduct "directed specifically toward the other person . . . that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person." *Long*, 931 S.W.2d at 288 (ellipsis inserted) (quoting former § 42.07(a)(7)(A) (1993)).[10] The conduct requirement was accompanied by a

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[10] Although the stalking law also contained a "threat" requirement, the threat was required for only one of two

culpable mental state of intent. *Id.* However, "conduct does not lose First Amendment protection merely because the actor intends to annoy the recipient." *Id.* at 293. The same can be said of an actor's intent to harass, alarm, abuse, torment, or embarrass. *Id.* at 296. But the sexual harassment provision contains at least three narrowing elements not found in the stalking provision: (1) that the perpetrator be a public servant acting under color of his office or employment, (2) that the perpetrator intentionally engage in conduct of a *sexual* nature (versus any conduct in the stalking provision), and (3) that the perpetrator intentionally impose a *quid pro quo.* With these narrowing elements, the sexual harassment provision targets conduct that is far more specific and far less innocent than the stalking provision's proscription against intentionally annoying, harassing, alarming, abusing, tormenting, or embarrassing conduct.

Although we are not bound by federal intermediate appellate opinions, we also find the Ninth Circuit's *Cohen* case distinguishable. In finding a First Amendment violation, the *Cohen* court found that the College had applied the "nebulous outer reaches" of its sexual harassment policy to a professor's longstanding teaching methods. 92

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predicate acts under the statute. *Id.* at 288 & 291. Because the stalking statute provided for no nexus between the two predicate acts and because the general "conduct requirement" could by itself distinguish the stalking offense from a lesser included offense that penalized threats, we held that the "conduct requirement" had to pass muster on its own, apart from the "threat requirement." *Id.* at 291-294. The sexual harassment provision, on the other hand, does not split the elements of the crime among different predicate acts.

F.3d at 972. The policy at issue in *Cohen* encompassed a "hostile learning environment" theory:

> Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, *but is not limited to,* circumstances in which:
>
> . . .
>
> Such conduct has the purpose *or effect* of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.

92 F.3d at 971 (emphasis added; ellipsis inserted). This "hostile learning environment" theory appears to be borrowed from the "hostile work environment theory" found in the EEOC regulations. *See* 29 C.F.R. 1604.11(a)(3). As can be seen from the language, the hostile environment theory is much broader than a *quid pro quo* theory. The sexual harassment policy in *Cohen* lacks both the culpable mental state and the *quid pro quo* elements found in the Texas provision. Under the policy in *Cohen,* a wink or a smile could in fact have been considered sexually harassing conduct even if the actor did not harbor a sexual purpose. Moreover, the policy's proscription against an "offensive learning environment" was much like the stalking law's open ended proscription against annoying conduct. Further, the policy in *Cohen* even included a clause that sexual harassment is not limited to the kinds of acts specifically proscribed. The Texas sexual harassment provision is quite unlike the open-ended policy addressed in *Cohen.*

C. Due Process

Absent First Amendment considerations, the Due Process Clause requires that a law be specific enough to: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) establish determinate guidelines for law enforcement. *Long*, 931 S.W.2d at 287. As we have stated above, when protected expression is not at issue, the defendant must show that the law is vague as applied to him (or vague in all of its possible applications).

We find that the phrase "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" is a reasonably specific phrase for Due Process purposes primarily because that phrase is modified by the culpable mental state of "intentionally." Because the perpetrator must intend the sexual nature of his conduct and must know that the conduct is unwelcome to trigger a violation of the statute, the unwelcome sexual conduct phrase reasonably informs ordinary citizens of the conduct proscribed and provides adequate guidelines for enforcement. As for the phrase "right, privilege, power, and immunity," we need not decide whether that phrase may in some instance deprive a person of fair notice of the conduct proscribed. As the statutory construction portion of this opinion shows, public sector employment clearly falls within the term "privilege," and hence, the statute clearly proscribes a public servant's attempt to condition a subordinate's continued employment or benefits associated with employment on submission to sexual behavior. Such employment-related conduct comprises the situation in the present case. Therefore, appellant cannot prevail on

his vagueness claim purely on Due Process grounds.[11] We find the sexual harassment provision to be constitutional on its face and as applied to appellant.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

MANSFIELD, J., filed a concurring opinion.

PRICE, J., filed a concurring opinion.

WOMACK, J., filed a concurring opinion.

MANSFIELD, J., delivered a concurring opinion.

I join the opinion of the majority but write further for two reasons:

(1) To provide a more detailed description as to the events that gave rise to this cause; and

(2) To try to clarify the difference between "sexual harassment" that is in bad taste, poor manners or otherwise might be that basis of civil liability and "sexual harassment" that may subject the actor to

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[11] We express no opinion concerning whether some or all of the allegations in the indictment contain all of the elements required by the sexual harassment provision as we have construed it. The Court of Appeals may address such issues on remand, if those issues are found to be properly before the court.

potential criminal liability under Texas Penal Code § 39.03.[1]

Appellant, during the period of time in which the events resulting in the charge against him took place, was chairman of the Board of VIA, the public transportation system for the City of San Antonio. Complainant was employed by the Board as an assistant for governmental affairs. As such, complainant reported to appellant as her de facto supervisor.

At trial, the complainant testified appellant began making sexual advances toward her.[2] These advances began in June of 1994. During August of 1994, according to the complainant, appellant's behavior escalated into requests for sex (complainant was married at the time, a fact known to appellant), or an affair, and threats that should she not comply she could lose her job. She declined his advances. Appellant told her he had had an affair with her predecessor and she had to do likewise. The complainant testified appellant repeated his demand that they have an affair during a business trip to Washington, D.C. in September of 1994. When she declined his

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[1] Texas Penal Code, § 39.03(a)(3) provides that a person commits the offense of official oppression if he "intentionally subjects another to sexual harassment." Section 39.03(c) defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power or immunity, either explicitly or implicitly." Official oppression is a Class A misdemeanor.

[2] Complainant's testimony consists of over 100 pages of the trial record. The first sexual advances occurred on a business trip to Port Aransas.

advances again, complainant testified appellant gave another employee of VIA the larger office that had been promised to her by appellant.

During October of 1994, complainant testified, she spoke to a coworker, Zamora, about the situation and thereafter appellant's sexual advances stopped for awhile. She also spoke with VIA's in-house EEOC person, who, she testified, was not helpful and told her, in effect, appellant was very powerful. Complainant subsequently testified appellant's advances became more frequent and more intense in December of 1994. On several occasions he told her she would be fired if she refused to have sex with him, and he would touch her on various parts of her body. He also belittled her marital status, talked about her legs, and, on one occasion, said a bruise on her leg was a result of rough sex. Complainant testified she continually told him to leave her alone; his response was, essentially, he was the chairman, had lots of power, and could do whatever he wanted.

During January of 1995, complainant told Zamora about appellant's latest advances; Zamora told complainant she should get appellant's advances on tape but, other than that, given appellant's power, there was not much she could do about it.[3]

During February of 1995, complainant filed complaints with the EEOC. On March 10, 1995, complainant give [sic] a written statement to a San Antonio Police

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[3] Other testimony established complainant never received a promised raise, secretarial support or more office space.

detective concerning this matter, describing the events that gave rise to the charge filed against appellant.

Texas Penal Code § 6.02 states that a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct delineated in the definition of the offense. The only way that a definition of an offense may dispense with the requirement of a culpable mental state is if that definition plainly dispenses with any mental element. Tex. Penal Code, § 6.02(b). Section 39.03(a)(3) clearly describes the mental state necessary for an individual to commit the offense of official oppression by sexual harassment: the actor must *intentionally* subject another to "sexual harassment." Furthermore, "sexual harassment" is carefully and specifically defined in § 39.03(c) as "unwelcome sexual advances. . . . "

Appellant's conduct in the present case was blatantly intentional: testimony established he continually made advances toward the complainant despite her repeated pleas for him to stop. Such behavior is commonly referred to as "quid pro quo" sexual harassment, i.e., the harasser tells the harassee that failure to submit will result in adverse employment-related consequences for the harassee. *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir.1982); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Complainant sustained adverse job-related consequences due to her refusal to submit, namely, the loss of a raise, a bigger office and secretarial assistance. She also was threatened with the loss of her job itself. There is little doubt that

such quid pro quo sexual harassment suffered by complaint might well give rise to redress under civil law.[4] Section 39.03 criminalizes only quid pro quo sexual harassment that is "intentional."

A statute will survive attack as being unconstitutionally vague provided it gives fair warning to the defendant as to what conduct it proscribes. *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Section 39.03 is not unconstitutionally vague, especially as applied to appellant. Section 39.03 criminalizes *only intentional* sexual harassment. Furthermore, the intentional sexual harassment *must have the added component* of a threat of loss of job-related rights (or other protected rights) made by the harasser and directed at the harassee. For there to be a conviction under § 39.03, the State must prove the defendant's actions were intentional and that the victim was threatened with the loss of a protected right or privilege should she not submit to the defendant's demands.

Testimony at trial established the required culpable mental state: appellant intentionally persisted in making unwelcome sexual advances despite complainant's requests that he cease doing so. Testimony at trial also established appellant told complainant that failure to

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[4] The other major category of sexual harassment is so-called "hostile work environment" sexual harassment. Examples of hostile work environment sexual harassment might include leaving sexually-suggestive materials around the workplace, making comments on fellow employees' appearance and/or dress, etc. It does not involve any threats of loss of employment or other rights or privileges.

comply with his demands would result in loss of her job (she did lose a promised raise and other job-related benefits), which meets the requirement of § 39.03(c) that the sexual harassment involve a threat to a valuable right or privilege of the victim (such as a job) should she not submit.

Certainly, § 39.03(c) does not criminalize protected speech, such as asking a coworker out for a date, making a comment about someone's dress or even what might amount to hostile work environment sexual harassment. In effect, all § 39.03(c) does is criminalize what is intentional sexual harassment coupled with extortion: either do what I want or else something bad will happen to you. It is difficult to see how this statute is either vague or runs afoul of the First Amendment, given how narrowly-drafted it really is.

With these comments, I join the opinion of the Court.

PRICE, J., delivered a concurring opinion.

I join the opinion of the majority and write separately in response to the conflicting views of what culpable mental state is required regarding the "unwelcomeness" of the conduct. *Ante* at 685 n. 7; *post* at 692 (Womack, J., concurring).

I disagree with the majority's assertion that the incident which incited this legislation appears unlikely to fall within the definition of sexual harassment that requires the actor to intend the unwelcomeness of the conduct. As the majority explains, that case involved a judge telling a woman he would take care of her ticket in exchange for oral sex. When asked by the woman if she could do

anything else, such as maintenance work around the courthouse, the judge responded "No, I have something else in mind for you." This colloquy could easily be interpreted as a sexual predator continuing his unwelcome advances, not only knowing they were unwelcome, but intending them to be unwelcome as a further display of his power and authority over the woman. Thus, I believe the case which incited this legislation, as well as the instant case, could be considered sexual harassment under either the majority's interpretation or Judge Womack's concurring opinion.

With these comments, I join the opinion of the Court.

WOMACK, J., filed a concurring opinion.

I do not join footnote 7 of the Court's opinion, in which it is said that Penal Code § 39.03(a)(3) "does not require the perpetrator to intend that the conduct be unwelcome," but only that "he intends sexual conduct that he knows is unwelcome." The Court "finds" this to be so, "[g]iven the structure of the statute and its apparent purposes."

The structure of the statute supports an opposite conclusion. Subsection (a)(1) has two culpable mental states; it is an offense for a certain person "intentionally" to subject another to conduct "that he knows is unlawful."[1] Subsection (a)(2) has two culpable mental states; it

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[1] "(a) A public servant acting under color of his office or employment commits an offense if he:

"(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful." TEX. PENAL CODE § 39.03(a)(1).

makes it an offense for a certain person "intentionally" to engage in certain conduct "knowing his conduct is unlawful."[2] Subsection (a)(3) has one culpable mental state: "intentionally." It never uses the word "knowing," nor does subsection (c).[3] If the legislature wanted to make it an offense to intentionally engage in conduct that the actor knew was unwelcome, it conspicuously failed to do in subsections (a)(3) and (c) what it naturally and clearly did in subsections (a)(1) and (2).

As to the purpose of the statute, the Court assures us that "the perpetrator . . . may in fact wish that the conduct were welcomed by the recipient." I shall not question the Court's knowledge that there are such persons. I shall not deny that it would have been a fine thing for the legislature and the governor to have made the conduct of such persons an offense; it may be that a statute that did so would have been better than the one

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[2] "(a) A public servant acting under color of his office or employment commits an offense if he:

> "(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful" *Id.*, § 39.03(a)(2).

[3] "(a) A public servant acting under color of his office or employment commits an offense if he:

> "(3) intentionally subjects another to sexual harassment." *Id.*, § 39.03(a)(2).

"(c) In this section, 'sexual harassment' means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly." *Id.*, § 39.03(c).

we have. But it is really unacceptable for the Court to hold that, if the statute means what it says, it would cause "absurd results" because it "would cover few instances of sexual coercion" – only those that are committed with "something in the nature of sadistic intent."[4] The holding begs the question; the Court can say that an instance of unintentional sexual conduct is "coercion" only by assuming that the legislature wanted to define that instance as coercion, which is assuming the point that is at issue. Worse, it is self-contradictory; the Court cannot say in one breath that a statute can be construed in a reasonable fashion, namely to reach sadistic, intentional conduct, and in the next breath that that construction leads to absurd results. The statute might not cover conduct as the Court wants, but that is not the same as its being absurd. We are not the legislature; we must deal with the statute that the legislature and the governor enacted. And that statute says it is an offense if a certain person "intentionally subjects another to . . . unwelcome . . . conduct of a sexual nature." I see no room in that language for a culpable mental state other than intent.

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[4] *Ante* at 685 n. 7.

APPENDIX B

Arthur Garcia SANCHEZ, Appellant,

v.

The STATE of Texas, Appellee.

No. 04-96-00140-CR.

Court of Appeals of Texas, San Antonio.

May 20, 1998.

Discretionary Review Granted
Nov. 18, 1998.

Stephanie L. Stevens, Mark Stevens, San Antonio, for appellant.

Daniel Thornberry, Asst. Criminal Dist. Atty., San Antonio, for appellee.

Before HARDBERGER, C.J., and STONE and JOHN F. ONION, Jr.,[1] JJ.

OPINION

JOHN F. ONION, Jr., Justice (Assigned).

This appeal is taken from a conviction for official oppression. *See* TEX. PENAL CODE ANN. § 39.03(a)(3), (c) (Vernon 1994).[2] Appellant, Arthur Garcia Sanchez, was

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[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas.

[2] The indictment alleged the offense occurred between August 1, 1994, and February 15, 1995. Section 39.03 became effective September 1, 1994. Therefore, the former statute (§ 39.02) was also implicated. *See* Act of May 24, 1973, 63rd Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883, 953, *as amended by* Act of May 28, 1989, 71st Leg., R.S., ch. 1217, § 1, 1989 Tex. Gen. Laws

indicted for subjecting another to sexual harassment, a Class A misdemeanor.[3] The jury found appellant guilty and assessed his punishment at confinement in the county jail for one year and a fine of $3,000. The jury, however, recommended community supervision.[4] The imposition of the sentence was suspended and appellant was placed on community supervision subject to certain conditions.

4934, 4935 (adding subsection 39.02(a)(3), (c)), *as amended by* Act of March 25, 1991, 72nd Leg., R.S., ch. 16, § 19.01(34), 1991 Tex. Gen. Laws 244, 369, *as amended by* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3674 (current version of § 39.03(a)(3), (c) to which reference will be made throughout instant opinion).

[3] The indictment charged official oppression which is within the jurisdiction of the district court. TEX. CONST. art. V, § 8; TEX.CODE CRIM. PROC. ANN. art. 4.05 (Vernon Supp.1998); *Emerson v. State*, 727 S.W.2d 267, 269 (Tex.Crim.App.1987). Official oppression is within the ambit of official misconduct. *See Emerson*, 727 S.W.2d at 268-69. At least, the district court had concurrent jurisdiction with the county court over the offense. *See Loughry v. State*, 926 S.W.2d 382, 385 (Tex.App. – Fort Worth 1996, pet. ref'd); *Campos v. State*, 783 S.W.2d 7, 8 (Tex.App. – Houston [14th Dist.] 1989, pet. ref'd).

[4] The statutory term "community supervision," TEX.CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp.1998), is used interchangeably with the term "probation." *See Rodriguez v. State*, 939 S.W.2d 211, 220 n. 12 (Tex.App. – Austin 1997, no pet.). The constitutional basis for "community supervision" is article IV, section 11a of the Texas Constitution which authorizes "probation," using that term.

POINTS OF ERROR

Appellant advances seven points of error. In two points of error, appellant challenges the constitutionality of the statute under which he was convicted, contending that the statute is vague on its face and, as applied to him, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These points are also inclusive of a First Amendment violation. We sustain these points of error. We do not find it necessary to enumerate the other points of error.

The indictment, as amended, alleged in pertinent part that:

> on or about the 1st day of August, A.D., 1994, through on or about the 15th day of February, A.D., 1995, ARTURO SANCHEZ, while acting under color of his office as a public servant, to wit: an officer, employee and agent of government, namely: Chairman and Board Member of the Board of Trustees of VIA METROPOLITAN TRANSIT, did intentionally subject DIANE GONZALEZ to sexual harassment, namely: unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature, by stating to DIANE GONZALEZ (hereinafter referred to as "COMPLAINANT") to the effect: that if COMPLAINANT did not have a sexual affair with him he would fire her; that to get an office, a secretary and a raise COMPLAINANT must have a sexual affair with him; that he had a sexual affair with another VIA employee and he would have a sexual affair with COMPLAINANT also; that he

would have a sexual affair with COMPLAINANT, that COMPLAINANT should have a sexual affair with him because people already thought they were having a sexual affair; that COMPLAINANT must put on lipstick; that he would like COMPLAINANT to wear low-cut dresses; that he would like COMPLAINANT to wear black pantyhose and silk blouses because she looked better in them; that upon seeing a bruise on COMPLAINANT'S leg, that he asked COMPLAINANT if she was bruised from rough sex with her husband, and that he liked rough sex; and by touching DIANE GONZALEZ with his hand on her face, submission to which was explicitly and implicitly made a term and condition of DIANE GONZALEZ's exercise and enjoyment of her rights, privileges, powers and immunities[5]. . . .

FACTS

The facts are not absolutely essential to our disposition of the instant case on constitutional grounds, but are briefly mentioned as background.[6]

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[5] The indictment is clearly no model. *Cf.* 7 Michael McCormick, Thomas Blackwell, Betty Blackwell, *Criminal Forms and Trial Manual*, § 20.03 at 157-58 (Texas Practice 1995).

[6] We need not set out the facts in great detail in view of our disposition of the case. The complainant Gonzalez was hired by the Board of Trustees of the Via Metropolitan Transit in San Antonio as an assistant to the Board in securing federal grant money. She was placed in the Public Affairs Division of Via, with instructions to report to appellant, the Board Chairman. The allegations of the indictment were chiefly supported by Gonzalez's testimony since the matters arose in private

THE VAGUENESS ISSUE

Appellant urges his "on its face" and "as applied" vagueness attacks upon section 39.03 under which he was

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conversations. Gonzalez commenced taping her conversations with appellant in December 1994 or January 1995. The tapes do not support the indictment's allegations. Several witnesses heard appellant tell Gonzalez to put on lipstick or makeup. The grand jury testimony by appellant was introduced. He acknowledged that on an occasion he told Gonzalez to put on lipstick because she looked pale.

Gonzalez acknowledged that she had been hired by the Board and could only be fired by the Board, but knew appellant as Chairman, had great influence and that appellant had so informed her. There was testimony that Gonzalez traveled by plane with appellant to a transportation conference in Washington, D.C., in September 1994, going earlier and coming back later than other representatives of Via at the conference. Gonzalez was instructed to attend after-work meetings at the bar at the Mi Tierra Restaurant several nights a week. Other evidence showed that appellant frequently called Gonzalez at her home at night and that there was concern on the part of one Board member about the relationship. Other testimony indicated that appellant prevented Gonzalez from attending some Board meetings and dictated to her which employee or employees with whom she could not have lunch.

There was no question that Gonzalez had demanded, requested, or expressed a desire repeatedly for a raise, an enclosed office, and a private secretary. One Board member testified that before Gonzalez started her $52,000 job, she requested a raise in order to influence the individuals with whom she would come into contact in the course of her employment. The request was denied. When Gonzalez commenced her employment, there was only one enclosed office in the Public Affairs Division which at the time was occupied by appellant. A smaller enclosed office was built for appellant and the larger one was assigned to Tom Campos, a staff member, by the general manager of Via and appellant. The

convicted, contending violations of the Due Process Clause of the Fourteenth Amendment to the United States

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secretary whom Gonzalez shared with others testified that she typed only three letters for Gonzalez in the eight months or so that Gonzalez was employed by Via.

Other evidence indicated that Gonzalez was constantly inquiring about appellant's whereabouts, spent a great deal of time in appellant's office with the door closed, seemed happy and "jolly" around appellant, and fawned over him. She was always offering to take appellant to lunch or to drive him places. Appellant had a disability as a result of having polio when he was a child. Some witnesses testified that Gonzalez followed appellant around the office, even waiting for him outside the men's restroom. On one occasion, appellant was heard to tell Gonzalez that "he didn't need a shadow, that he had two at home, his mother and his dog." Gonzalez was also seen playing "patty-cake" with appellant at the bar at Mi Tierra.

There was evidence of dissension in the office between Gonzalez and other women employees, some of it arising from Gonzalez's insistence that she was another employee's supervisor. Gonzalez was to complete a legislative agenda project for the Board regarding federal grant money. The report was delayed month by month and, when it was tendered to the Board in January 1995, it was found unacceptable. There was evidence that the Board was generally becoming dissatisfied with Gonzalez's work.

Gonzalez terminated her employment on February 15, 1995, and filed a EEOC complaint. Her husband and brother, both lawyers, presented a 1.2 million dollar claim to Via which was refused. A civil suit was filed and the instant criminal indictment came later.

The trial court's jury charge tracked the indictment but submitted each allegation disjunctively authorizing conviction on any one of the allegations.

Constitution.[7] Appellant has included in his argument a claim that the statute in question is also overbroad and impinges on the freedom of speech guaranteed by the First Amendment to the United States Constitution, which amendment is applicable to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Olvera v. State*, 806 S.W.2d 546, 548 n. 2 (Tex.Crim.App.1991). In the area of First Amendment rights, stricter standards of permissible statutory vagueness apply to a statute. The overbreadth and vagueness doctrines are conceptually distinct, but in the First Amendment context they tend to overlap since statutes are often overly broad because their language is vague about what behavior is proscribed. *See* 16A C.J.S. *Constitutional Law*, § 459 at 483 (1984).

"Whenever an attack upon the constitutionality of a statute is presented for determination, we commence with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting the statute." *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex.Crim.App.1978); *Ex parte Anderson*, 902 S.W.2d 695, 698 (Tex.App. – Austin 1995, pet. ref'd). The burden rests upon the individual challenging the statute to establish its unconstitutionality. *Granviel*, 561 S.W.2d at 511. The statute must be upheld if a reasonable construction

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[7] Appellant does not advance any argument based on the Texas Constitution. We need not consider such contention. *See Corwin v. State*, 870 S.W.2d 23, 27 n. 2 (Tex.Crim.App.1993); *Morehead v. State*, 807 S.W.2d 577, 579 n. 1, (Tex.Crim.App.1991); *McCambridge v. State*, 712 S.W.2d 499, 501-02 n. 9 (Tex.Crim. App.1986).

can be ascertained which will render the statute constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex.Crim.App.1979).

A criminal statute must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Long v. State*, 931 S.W.2d 285, 287 (Tex.Crim.App.1996). "The rationale for this is obvious: crimes must be defined in advance so that individuals have fair warning of what is forbidden." *Bynum v. State*, 767 S.W.2d 769, 773 (Tex.Crim.App.1989). A lack of notice poses a "trap for the innocent . . . ," *United States v. Cardiff*, 344 U.S. 174, 176, 73 S.Ct. 189, 97 L.Ed. 200 (1952), and "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Second, the criminal law must establish determinate guidelines for law enforcement. *Long*, 931 S.W.2d at 287. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294 (emphasis in original). "Where inherently vague statutory language permits selective law enforcement, there is a denial of due process." *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Either the lack of notice or lack of guidelines for law enforcement is an independent ground for finding a statute void for vagueness. *Adley v. State*, 718 S.W.2d 682, 685 (Tex.Crim.App.1985).

Third, where First Amendment's freedoms are implicated, the law must be sufficiently definite not to abridge the right of free speech, but also to avoid chilling protected expression. *Grayned*, 408 U.S. at 109, 92 S.Ct. 2294. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness demands a greater degree of specificity than in other contents." *Kramer v. Price*, 712 F.2d 174, 177 (5th Cir.1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir.1983), *grant of relief aff'd*, 723 F.2d 1164 (5th Cir.1984). Greater specificity is required to preserve adequately the right of free expression because uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Long*, 931 S.W.2d at 288 (quoting *Grayned*, 408 U.S. at 109, 92 S.Ct. 2294). First amendments are intertwined with the vagueness issue. *Long*, 931 S.W.2d at 288.

THE STATUTE

The official oppression statute criminalizes certain acts by a public servant acting under the color of his office or employment. TEX. PENAL CODE ANN. § 39.03 (Vernon 1994). The statute provides:

> (a) A *public servant acting under color of his office or employment commits an offense if he:*
>
> > (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
> >
> > (2) intentionally denies or impedes another in the exercise or enjoyment of any

> right, privilege, power, or immunity, knowing his conduct is unlawful; or
>
> (3) *intentionally subjects another to sexual harassment.*
>
> (b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.
>
> (c) *In this section, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.*
>
> (d) An offense under this section is a Class A misdemeanor.

(emphasis added).

Subsections (a)(3) and (c) were first added to the statute in 1989[8] and it is under these provisions that appellant was prosecuted and it is these provisions which appellant contends are unconstitutional, vague and overbroad.

Section 39.03 applies only to a "public servant," which is a far more expansive term than a person who is simply elected, appointed, or employed in a public office.

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[8] See note 2.

See TEX. PENAL CODE ANN. § 1.07(a)(41) (Vernon 1994).[9] Such public servant is prohibited from subjecting "another" to sexual harassment. "Another" means "a person other than the actor." TEX. PENAL CODE ANN. § 1.07(a)(5) (Vernon 1994); *Bryson v. State*, 807 S.W.2d 742, 746 (Tex.Crim.App.1991). A "person" means "an individual, corporation, or association." TEX. PENAL CODE ANN. § 1.07(a)(38) (Vernon 1994). It is clear that section 39.03(a)(3)(c) includes both genders within the term "another." Repeated acts or a course of conduct is not required, one act would constitute a violation of the statute.

Section 39.03(a)(3) must be read in light of the statutory definition of sexual harassment in subsection (c) which provides: "In this section 'sexual harassment'

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[9] "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties:

(A) an officer, employee, or agent of government;

(B) a juror or grand juror; or

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or

(D) an attorney at law or notary public when participating in the performance of a governmental function; or

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

TEX. PENAL CODE ANN. § 1.07(a)(41) (Vernon 1994).

means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly." It has been held that this statutory definition includes the specific alternative manner and means of committing the crime proscribed by section 39.03(a)(3). *State v. Edmond*, 933 S.W.2d 120, 129-30 (Tex.Crim.App.1996). The essential element of "sexual harassment" must be proved by alternative sub-elements in order to establish an offense.

Appellant contends that almost every word in subsection (c) is inherently vague, giving no fair notice what is prohibited and furnishing no guidelines for law enforcement to avoid selective prosecution. Appellant raises some questions and others arise from the face of subsection (c). What are "advances" or "favors?" What makes them sexual? Does a wink of an eye, a simple smile, a compliment, the placing of a rose in a vase, an invitation to lunch, or a ride home qualify? What enormous range of conduct is contemplated by the catch-all phrase "or other verbal or physical conduct of a sexual nature?" Does "unwelcome" apply to "requests for sexual favors" and "other verbal and physical conduct of a sexual nature" as it does to "sexual advances?" Must the potential offender know in advance that his conduct is unwelcomed or unlawful? Is there no offense if the sexual conduct is welcomed by the recipient? Is the lawfulness of the accused's act or omission determined by each recipient's subsequent emotional reaction on a case-by-case basis? Whose sensitivities are involved or from whose perception is the act to be viewed?

What exactly does "submission" mean under the statute? What constitutes an "implicit" term or condition? Are all these matters to be determined objectively or subjectively? What is contemplated by the expansive phrase "a person's exercise or enjoyment of *any* right, privilege, power, or immunity?" Is the phrase limited to a recipient's rights, privileges, powers, or immunities in existence at the time of the alleged sexual conduct? Does it incorporate the potential enlargement of such matters or the creation of new rights, privileges, etc., if within the scope of the accused's power? Does the term "a person's" refer only to the right, privilege, etc., of the complainant or alleged recipient of the conduct of a sexual nature, or is it to be given a broader interpretation? A "person" is defined as an individual, corporation or association. TEX. PENAL CODE ANN. § 1.07(a)(38). May a recipient believe submission is implicitly conditioned on her or his father's or mother's or another person's exercise or enjoyment of that particular person's rights, privileges, powers, and immunities? Must the potential offender know in advance the full extent of any person's rights, privileges, powers, and immunities? These matters are extremely broad terms used in a variety of contexts and are sometimes overlapping in meaning. Does "any right" as used in the statute refer to rights which can be described as perfect or imperfect, in personam or in rem, primary or secondary, absolute or qualified, or legal or equitable? Does the term also refer to constitutional rights such as natural rights, civil rights, political rights, and personal rights? Even the term "personal rights" is a term of rather vague import.

See BLACK'S LAW DICTIONARY 1325 (6th ed.1990). Furthermore, does the statute in question provide for a reasonable person standard?

Appellant calls attention to a number of cases where the particular statute involved was held unconstitutionally vague because of the failure to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *See City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 452, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) ("the word 'humane' was impermissibly vague as a definition of conduct subject to criminal prosecution"); *Smith*, 415 U.S. at 573, 94 S.Ct. 1242 (finding vague a statute which made it illegal to treat a flag "contemptuously" because "what is contemptuous to one man may be a work of art to another"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) (holding an ordinance vague because "conduct that annoys some people does not annoy others"); *May v. State*, 765 S.W.2d 438, 440 (Tex.Crim.App.1989) (the inherent vagueness of telephone harassment statute, in attempting to define what annoys and alarms people and its failure to specify whose sensitivities are relevant, rendered statute unconstitutionally vague); *Cotton v. State*, 686 S.W.2d 140, 141 (Tex.Crim.App.1985) (Texas statute providing criminal penalties for sale of beer to a person "showing evidence of intoxication" was unconstitutionally vague); *Ex parte Chernosky*, 153 Tex.Crim. 52, 217 S.W.2d 673, 674 (1949) (holding words in reckless driving statute "without due caution or circumspection" were vague and indefinite rendering statute unconstitutional); *see also Long*, 931 S.W.2d at 289-90 (discussing constitutional problems with

anti-stalking statute due to the failure to establish a "reasonable person" requirement).

Appellant further urges that section 39.03(c) is vague because it "encourages arbitrary and erratic arrests and convictions," citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). A criminal statute must itself be precisely drawn so that it eliminates the risk of capricious application rather than foster it. *Cotton*, 686 S.W.2d at 143. Appellant contends that the term "sexual harassment" in the statute is so broadly defined that it permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Adley*, 718 S.W.2d at 683 (striking down as vague gambling statute because "legislature has failed to sufficiently define the conduct of 'receiving a bet' so as to limit law enforcement and prosecutorial discretion in prosecuting only the professional, exploitive gambler"); *Baker v. State*, 478 S.W.2d 445, 448 (Tex.Crim.App.1972) (statute defining vagrant as being a person who "has no visible means of support" or who has "no property to support" him gives no standard to guide officers charged with enforcing statute, thus placing discretion in hands of police); *Meisner v. State*, 907 S.W.2d 664, 669 (Tex.App. – Waco 1995, no pet.) (traffic ordinance unconstitutionally vague, because, inter alia, the prosecutor "was able to construe the ordinance to fit the offense").

When attempting to discern the legislative intent in enacting a statute, a court must focus on the literal text, the plain meaning of the enactment. *Boykin v. State*, 818

S.W.2d 782, 785 (Tex.Crim.App.1991). If the plain language of the statute would lead to absurd results or the words are ambiguous, then the court may consider extratexual sources to aid the interpretation. *Id.* The State contends that in a void-for-vagueness examination, the court should look at the context and purpose of the statute, and that entire language of the enactment, not just isolated phrases, should be considered. We agree. Moreover, "a statute is not unconstitutionally vague merely because words or terms used are not specifically defined." *Engelking v. State*, 750 S.W.2d 213, 215 (Tex.Crim.App.1988); *Ex parte Anderson*, 902 S.W.2d at 699. Undefined words are ordinarily given their plain meaning unless the statute clearly shows that they were used in some other sense. *Anderson*, 902 S.W.2d at 699. Statutory words are to be read in context and construed according to the rules of grammar and common usage. TEX. GOV'T. CODE ANN. § 311.011(a) (Vernon 1988). A statutory provision need not be cast in terms that are mathematically precise; it need only give fair warning of the conduct proscribed and provide guidelines for law enforcement. *Grayned*, 408 U.S. at 110, 92 S.Ct. 2294; *State v. Garcia*, 823 S.W.2d 793, 798 (Tex.App. – San Antonio 1992, pet. ref'd).

Although not suggested by the State, we have examined the legislative history of H.B. 370 of the 71st Legislature in 1989 which resulted in the enactment of section 39.03(a)(3), (c).[10] Regrettably, neither the bill analysis nor the tapes of the House and Senate public hearings on the bill were helpful in divining the legislative intent. *See*

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[10] *See* note 2.

H.B. 370, House Criminal Jurisprudence Subcommittee hearings May 11 and 17, 1989, Tapes, side one; H.B. 370, Senate Criminal Justice Committee, May 25, 1989, Tape, side one. It appears that the addition to the official oppression statute (which became section 39.02(a)(3), (c) in 1989) was proposed because in 1988 a municipal judge had purportedly offered to dismiss a woman's traffic tickets in return for sexual favors. The hearings indicated that an indictment against the judge was quashed,[11] and he was prosecuted for a minor offense. The proponents of the bill contended that there was a gap in the law, while opponents claimed that "sexual harassment" was difficult to define, and that H.B. 37 would create a poorly worded offense to be levied against public officials by disgruntled individuals.[12]

The State urges that a criminal statute can be sustained if a challenged term in the statute has a well-defined meaning in the civil jurisprudence of the state, citing *Luplow v. State*, 897 P.2d 463, 468 (Wyo.1995). The prosecutor advances the contention that the "context" of section 39.03(a)(3), (c) is an apparent derivation from sexual discrimination actions brought under Title VII of the Federal Civil Rights Act of 1964. The Texas Commission on Human Rights Act makes it unlawful for an employer to discriminate against an employee with

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[11] The nature of the indictment and the basis of the quashed order were not revealed by the legislative tapes.

[12] Neither the bill analysis nor the legislative tapes mentioned the Commission on Judicial Conduct. *See* TEX. GOV'T.CODE ANN. § 33.001, et seq. (Vernon 1988).

respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age. TEX. LAB.CODE ANN. § 21.051 (Vernon 1996). The Human Rights Act is modeled on federal law with the purpose of executing the objectives of Title VII of the Civil Rights Act of 1964, as amended, 42 USCA § 2000e, et seq. *See* TEX. LAB.CODE ANN. § 21.051, 1.02 (Vernon 1996); *Ewald v. Wornick Family Foods Corp.*, 878 S.W.2d 653, 658 (Tex.App. – Corpus Christi 1994, writ denied). The United States Supreme Court has interpreted the language of Title VII (42 USCA § 2000e-2(a)(1) 1997)[13] to include "sexual harassment" as a form of sexual discrimination in the field of employment practice. Sexual harassment is recognized as employment discrimination. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); *Ewald*, 878 S.W.2d at 658. Two separate civil causes of action have arisen under Title VII – quid pro quo harassment and harassment due to a hostile or abusive work environment. *Meritor*, 477 U.S. at 66, 106 S.Ct. 2399; *Syndex Corp. v. Dean*, 820 S.W.2d 869, 871 (Tex.App. – Austin 1991, writ denied).

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[13] Section 2000e-2(a)(1) states in part:

Employer practices

It shall be unlawful employment practice for an employer –

> 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

Normally, an action for quid pro quo harassment arises when a subordinate employee is pressured to engage in some type of sexual activity with a supervisor as a condition of retaining employment or receiving consideration for a promotion. *See, e.g., Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1362 (11th Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2nd Cir.1994). The action is characterized by an exchange of sexual favors for some job-related benefit. *See Collins v. Baptist Mem'l Geriatric Ctr.*, 937 F.2d 190, 196 (5th Cir.1991); *Ewald*, 878 S.W.2d at 658. And in a quid pro quo sexual harassment case, the court can reach its conclusion by the use of either the objective standard or the subjective standard. *Nichols v. Frank*, 42 F.3d 503, 511-12 (9th Cir.1994).

> In hostile or abusive work environment sexual harassment, an exchange of favors may or may not occur. Here, the victim is subjected to abuse and hostility in the work environment itself. To determine if a work environment is abusive or hostile, courts look at all related circumstances to determine whether a reasonable person would perceive the environment as hostile or abusive. In reviewing the circumstances, courts also consider the victim's own subjective perception of the environment.

Regina L. Stone-Harris, *Same Sex Harassment – The Next Step In The Evolution of Sexual Harassment Law Under Title VII*, 28 St. Mary's Law Journal 269, 274-75 (1996).

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII. Pursuant to that authority, the EEOC has adopted certain guidelines defining the scope of sexual harassment:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 CFR § 1604.11(a) (1997).

The State takes the position that the Legislature in enacting section 39.03(a)(3), (c) criminalized the civil "quid pro quo" sexual harassment by a public servant and rejected the "hostile work environment" sexual harassment for inclusion in the statute. The State in its brief notes the elements of a civil quid pro quo claim,[14] but fails to show just how these elements have been

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[14] The elements of a civil quid pro quo claim are: (1) the employee is a member of a protected class; (2) the employee is subject to unwelcome sexual advances or requests for sexual favors by one with apparent or actual authority over the employee; (3) the harassment complained of is based on sex; (4) the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability. *See Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir.1986); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir.1982); *Soto v. El Paso Natural Gas*, 942 S.W.2d 671, 677-78 (Tex.App. – El Paso 1997, writ denied); *Ewald*, 878 S.W.2d at 658-59.

criminalized in section 39.03(a)(3), (c) or what terms or words in the criminal statute have a well-defined meaning in the civil jurisprudence of the state that must be applied to the criminal statute.

It is clear that the criminal statute here in issue is far broader than Title VII or the EEOC guidelines. It is not limited by any means to the workplace, the employer-employee relationship, or equal opportunity for employment. Without a doubt, the definition of "sexual harassment" in section 39.03(c) was lifted in large part from the EEOC guidelines quoted above. *See* 29 CFR § 1604.11(a)(1). However, instead of the phrase "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," section 39.03(c) uses the language "submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly by or implicitly." The term "any right, privilege, power, or immunity" is obviously borrowed from subsection (a)(2) of section 39.03 without the requirement that the public servant knows that "his conduct is unlawful." Subsection 39.03(c) is clearly a hybrid.

Whatever genes section 39.03(a)(3), (c) may have inherited from the federal and state civil law as attributed to it by the prosecution, the criminal statute is no clone. Furthermore, there is a greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). A statute that imposes a criminal penalty is subject to a greater degree of scrutiny by a reviewing court. *Lear v.*

State, 753 S.W.2d 737, 740 (Tex.App. – Austin 1988, no pet.). This is particularly true in addressing vagueness and overbreadth challenges. *City of Houston v. Hill*, 482 U.S. 451, 459, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (citing *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948)); *Olvera*, 806 S.W.2d at 550.

As earlier noted, an enactment is void for vagueness under the Due Process Clause of the Fourteenth Amendment if it fails to draw reasonably clear lines between lawful and unlawful conduct. *Smith*, 415 U.S. at 574-78, 94 S.Ct. 1242; *Kramer*, 712 F.2d at 176. Many of the words used in section 39.03(c) are susceptible to uncertainties of meaning and are inherently vague. The vagueness of these terms have been questioned and discussed earlier. Moreover, the statute fails to specify whose sensitivities must be offended. *Coates*, 402 U.S. at 614, 91 S.Ct. 1686. "Coates recognized that a statute is unconstitutionally vague when the standard of conduct it specifies is dependent on each complainant's sensitivity." *Kramer*, 712 F.2d at 178. The potential offender is left to estimate the subjective sensitivity of the recipient on a case-by-case basis. An examination of section 39.03(a)(3), (c) also fails to reveal a reasonable person standard. We do not even find the words "reasonably likely" which were rejected as insufficient to establish a reasonable person standard in *Long*, 931 S.W.2d at 289. Our research of the legislative history of the statute is inconclusive as to any legislative intent to establish a reasonable person or objective standard. Had the Legislature intended a reasonable person standard, it could have easily specified one. *See Long*, 931

S.W.2d at 290. The absence of a reasonable person standard, however, is not necessarily fatal to a statute's constitutionality if other provisions of the statute sufficiently define the offense to avoid a vagueness problem. *Id.*; *see also Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972); *DeWillis v. State*, 951 S.W.2d 212, 216 (Tex.App. – Houston [14th Dist.] 1997, no pet.). Like *Long*, we find no factors present to compensate for the lack of a reasonable person standard. *See Long*, 931 S.W.2d at 290-95. It would appear that section 39.03(a)(3) is unconstitutional because the conduct requirement of the law is vague and a reasonable person standard cannot be read into the law, unless there are other factors that may save it.

INTENT

A requirement of scienter may mitigate a law's vagueness, especially with regard to the adequacy of notice to an individual that his conduct is proscribed. *See Hoffman Estates*, 455 U.S. at 499, 102 S.Ct. 1186; *Screws v. United States*, 325 U.S. 91, 101-02, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *Meisner*, 907 S.W.2d at 668; *Wisenbaker v. State*, 860 S.W.2d 681, 689 (Tex.App. – Austin 1993, pet. ref'd). Specifying an intent element, however, does not save a criminal statute from vagueness where the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague. *See Kramer*, 712 F.2d at 178.

Section 39.03(a)(3) specifies a mental state of "intentionally"[15] as opposed to mere knowledge or recklessness, but the mental state required does not solve the vagueness of the underlying conduct. Subsection (c) defining "sexual harassment" covers any conduct of a sexual nature in which a person could possibly engage. The limiting function, if any, of the phrase beginning "submission to which . . . " is equally fuzzy and vague and is offset by the expansive coverage of all conduct of a sexual nature, be it verbal or physical. *See Long*, 931 S.W.2d at 289. Whatever an accused's intent may be, if he or she is unable to determine the underlying conduct proscribed by a statute, then the statute fails on vagueness grounds. *See Kramer*, 712 F.2d at 178. The intent requirement of section 39.03(a)(3), (c) does not save it from the vagueness challenges.

NARROWING CONSTRUCTION

A statute should be voided for vagueness only if the statute, when narrowly construed, still poses a serious possibility of confusion. Courts have a general duty to employ reasonable narrowing constructions to avoid constitutional violations. *Morehead*, 807 S.W.2d at 581; *Olvera*, 806 S.W.2d at 552. If the statute, however, is not readily subject to a narrowing construction, courts may not assume the legislative prerogative and rewrite a statute in order to save it. *Olvera*, 806 S.W.2d at 552. Considerable language cannot be added to the statute without the courts engaging in judicial legislation. Moreover, courts

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[15] *See* TEX. PENAL CODE ANN. § 6.03 (Vernon 1994).

may not sever from the statute an element of the offense where such action would broaden the scope of the statute, prohibit new conduct, and violate legislative intent. *See Howard v. State*, 617 S.W.2d 191, 192 n. 1 (Tex.Crim. App.1979).

In *Long*, 931 S.W.2d at 295, the Court of Criminal Appeals held for the first time that a narrowing construction could be applied in the vagueness context as it had been applied in the overbreadth-First Amendment context in the past. At first blush, it would seem that a narrowing construction could be validly applied in the instant case by eliminating subsection (c) defining "sexual harassment" leaving subsection (a)(3) standing alone ("intentionally subjects another to sexual harassment"). This would require giving the term its plain and ordinary or common meaning. *Anderson*, 902 S.W.2d at 699.[16] To do

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[16] The term "sexual harassment" is limited to or is described as a type of employment discrimination arising out of Title VII of the Civil Rights Act of 1964. BLACK'S LAW DICTIONARY 1375 (6th ed.1990). The term is not ordinarily found defined as a term. "Sexual" means pertaining to or characteristic of sex, the sexes, or the organs or functions of sex. The READER'S DIGEST GREAT ENCYCLOPEDIC DICTIONARY (1966); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 1188 (1972). "Harass" means (1) to disturb or irritate persistently; (2) to wear out; exhaust. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 600 (1972). "Harass" has been described as a "course of conduct" which implies repetition or conduct of a continuing nature, directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose. *See Benton v. Comm'n of Lawyer Discipline*, 933 S.W.2d 784, 787 (Tex.App. – Corpus Christi, 1996), *reh'g overruled*, 941 S.W.2d 229 (Tex.App. – Corpus Christi, 1997, no writ). "Harass" is used as a variety of legal contexts to describe

so would significantly alter the meaning of the statute as drafted by the Legislature. The manner and means of committing the offense would be changed. A new offense would be created. This the courts are not allowed to do under the guise of narrowing the construction of a statute with a gloss of constitutionality validity. Even if this was not true, leaving "sexual harassment" statutorily undefined runs the risk of leaving the reconstructed statute vague. In *Nichols*, the court stated:

> *(b) Definition.* The question of what constitutes sexual harassment is a complicated and increasingly important one in our society. There is no agreed upon definition of the newly popular term. In some versions, it appears to cover the widest possible range of sins, from physical assault to reading a magazine in a public facility. Whether particular conduct is appropriate or whether it crosses the line is the subject of disagreement and controversy, always heated and often legitimate. Public opinion can change rapidly. It is quite possible for conduct that is acceptable today to become unacceptable tomorrow. One's views are influenced by one's age, sex, national origin, religion, philosophy, education, and experience. There is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct.

Nichols, 42 F.3d at 509-10.

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words, gestures, and actions which tend to annoy, alarm and abuse (verbally) another person. BLACK'S LAW DICTIONARY 717 (6th ed.1990).

We conclude that this court may not validly reconstruct 39.03(a)(3), (c) in order to hold it constitutional. Any changes are within the province of the Legislature.

Section 39.03(a)(3), (c) is unconstitutionally vague as a matter of due process on the basis of the twin dangers of a vague law – lack of notice and arbitrary and discriminatory application.[17] We uphold the due process challenge as the enactment is impermissibly vague in all of its applications, including application to appellant.[18] The statutory language in section 39.03(a)(3), (c) offends the Due Process Clause in the absence of an ascertainable standard. *See Smith*, 415 U.S. at 578, 94 S.Ct. 1242. The deficiency is particularly objectionable in view of the unfettered latitude accorded law enforcement officials, prosecutors, and triers of fact to apply their own notions of sexual harassment. *Id.*

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[17] Each of the twin dangers of a vague law is an independent ground for finding a statute void for vagueness. *Adley*, 718 S.W.2d at 685.

[18] *See Hoffman Estates*, 455 U.S. at 494-95, 102 S.Ct. 1186; *State v. Garcia*, 823 S.W.2d 793, 796-97 (Tex.App. – San Antonio 1992, pet. ref'd). Normally, where First Amendment rights are not involved, an accused must show, in his challenge to the statute on the basis of vagueness, that the statute is unconstitutional as applied to him in his situation; that it may be unconstitutional to others is not sufficient. *Bynum*, 767 S.W.2d at 774. However, where the statute is impermissibly vague in all its applications, a different rule applies. *Briggs v. State*, 740 S.W.2d 803, 806 (Tex.Crim.App.1987); *Anderson*, 902 S.W.2d at 699.

ALTERNATIVE BASIS – FIRST AMENDMENT

As an alternative basis for our holding, we further find that section 39.03(a)(3), (c) is overbroad and violates the First Amendment to the United States Constitution, applicable to the states by virtue of the Fourteenth Amendment. *Olvera*, 806 S.W.2d at 548 n. 2. Appellant raised this issue in the court below and it is included and briefed in his argument to this court. The State contends the issue was not raised on appeal, but briefs the issue nonetheless. The "brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX.R.APP. P. 38.1(e). Moreover, First Amendment considerations are intertwined with the vagueness issue. *See Long*, 931 S.W.2d at 288. In the area of First Amendment rights, stricter standards of permissible statutory vagueness apply to a statute. First amendment rights are not to be abridged or even chilled by statutory vagueness. 16A C.J.S. *Constitutional Law* § 459 at 483 (1984).

The State has, within its police power, the right to protect its legitimate interests. *See Blanco v. State*, 761 S.W.2d 38, 40 (Tex.App. – Houston [14th Dist.] 1988, no pet.) (citing *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949)). The right of the State is limited only by individual constitutional rights, such as First Amendment's free speech. *Clark v. State*, 665 S.W.2d 476, 482 (Tex.Crim.App.1984). An attack on a statute as being overbroad is normally and traditionally reserved for complaints concerning alleged First Amendment violations. *Bynum*, 767 S.W.2d at 772.

Overbreadth is a term to describe a situation where a statute prescribes not only what may constitutionally be proscribed, but also forbids conduct which is protected, especially the First Amendment's safeguards of speech and press. The First Amendment literally forbids the abridgement only of "speech," but its protection does not end at the spoken or written word. Conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. *See Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *see also* 16A C.J.S. *Constitutional Law*, § 459 at 484-85. Constitutional violations may also arise from the "chilling" effect of statutory provisions that fall short of direct prohibition against exercise of First Amendment rights. *See Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th cir.1990).

An individual whose own activities may validly be prohibited is permitted nonetheless to challenge a statute as overbroad because it also threatens others not before the court. *Dubuisson v. State*, 572 S.W.2d 694, 696 (Tex.Crim.App.1978). "The overbreadth doctrine has often been understood as an exception to the rule that individuals generally may not litigate the rights of third parties." Lawrence Tribe, *American Constitutional Law* § 12-27 at 1023 (1988); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *NAACP v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). When this exception is applied, it may appear to be vindicating the rights of third parties, but in fact is doing no more than judging the party before the court by a permissible standard (the right of a litigant

to be judged in accordance with a constitutionally valid rule of law). *See Tribe*, § 12-27 at 1024.

The elements of First Amendment overbreadth analysis are familiar. *Smith*, 415 U.S. at 572 n. 7, 94 S.Ct. at 1247 n. 7; *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294; Tribe, § 12-27 at 1012l. Only a statute that is substantially overbroad may be invalidated on its face. *City of Houston*, 482 U.S. at 458, 107 S.Ct. 2502; *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Criminal statutes, however, that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they have legitimate application. *Hill*, 482 U.S. at 459, 107 S.Ct. 2502; *Kolender*, 461 U.S. at 359 n. 8, 103 S.Ct. 1855 n. 8.

The instant statute deals with speech and expressive conduct. Section 39.03(a)(3), (c) by its literal language makes sexual harassment in part out of "unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature." This all-encompassing phrase constitutes the alternative manner and means of committing the offense. The First Amendment forbids the states to punish the use of words or language not within narrowly limited classes of speech. *Gooding v. Wilson*, 405 U.S. 518, 521-22, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Even to such classes the statute must be carefully drawn or authorizedly construed to punish only unprotected speech. *Id.* "Speech is often provocative and challenging . . . [But it] is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantial evil that arises far above public inconvenience, annoyance, or

unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Morehead*, 807 S.W.2d at 580.

The instant statute is not narrowly tailored to prohibit only disorderly conduct, fighting words, obscene or opprobrious language, or unprotected speech. There is nothing to suggest that the nature of the statute with regard to protected speech or expressive activity is both inevitable and essential to maintain public order.

We conclude that section 39.03(a)(3), (c) is impermissibly overbroad because in addition to proscribing activity which may be validly forbidden constitutionally, it sweeps within its coverage a substantial amount of expressive activity which is protected by the free speech guarantee of the First Amendment. The protected activity is a significant part of the law's target. There exists no satisfactory way of severing the law's constitutional from its unconstitutional application so as to excise the latter from the law's reach. The State has an interest in the matter expressed by the nature of the statute but only by a constitutionally drafted statute.

Appellant's first two points of error are sustained. The judgment of conviction is reversed and appellant is ordered acquitted.

APPENDIX C

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

TEXAS PENAL CODE § 39.03 OFFICIAL OPPRESSION

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) In this section, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

(d) An offense under this section is a Class A misdemeanor.